UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONCISE SUMMARY OF THE CASE

Pursuant to 3rd Cir. LAR 33.3, counsel are required to file a concise summary of the case within **14** days of the date of docketing of the Notice of Appeal. Total statement is limited to no more than 2 pages, single-spaced. Counsel may utilize this form or attach a 2 page statement encompassing the information required by this form.

SHORT CAPTION: In Re: National Football League Players' Concussion Injury Litigation

USCA NO.: 18-2225

LOWER COURT or AGENCY and DOCKET NUMBER:
2-12-md-02323

NAME OF JUDGE: Anita A. Brody

Specify who is suing whom, for what, and the subject of this action. Identify (1) the nature of the action; (2) the parties to this appeal; (3) the amount in controversy or other relief involved; and (4) the judgment or other action in the lower court or agency from which this action is taken:
See Attached

LIST and **ATTACH** a copy of each order, judgment, decision or opinion which is involved in this appeal. If the order(s) or opinion(s) being appealed adopt, affirm, or otherwise refer to the report and recommendation of a magistrate judge or the decision of a bankruptcy judge, the report and recommendation or decision shall also be attached.

ECF 10019 - Explanation and Order re allocation of attorneys fees
ECF 9860 - Memorandum on common benefit fees and costs
ECF 9861 - Order awarding common benefit fees and costs
ECF 9862 - Memorandum on capping attorneys fees
ECF 9863 - Order capping attorneys fees
ECF 8310 - Order to show cause re appointment of Professor Rubenstein
ECF 8376 - Order appointing Professor Rubenstein
ECF 9527 - Receipt of Professor Rubenstein's Reply (ECF 9571)
ECF 9510 - Order denying motion to compel CMO 5 attorney fee and cost data
ECF 9898 - Order denying motion for fee petition discovery
ECF 9985 - Order denying motion for case management order governing applications for attorneys' fees
ECF 9890 - Order denying motion and joinders for appointment of Administrative Class Counsel
ECF 10085 - Order denying motion for reconsideration of order disallowing deposition of Professor Rubenstein
ECF 10042 - Order denying motion for reconsideration/new trial & denying motion to stay

Provide a short statement of the factual and procedural background, which you consider important to this appeal:

See Attached

Identify the issues to be raised on appeal:

See Attached

This is to certify that this Concise Summary of the Case was electronically filed with the Clerk of the U.S. Court of Appeals for the Third Circuit and a copy hereof served to each party or their counsel of record

this 20th day of June ,2018.

/s/ Lance H. Lubel

Signature of Counsel

Rev. 07/2015

IDENTITY OF APPELLANTS:

Class Members Melvin Aldridge, Patrise Alexander, Charlie Anderson, Charles E. Arbuckle, Cassandra Bailey Individually and as the Representative of the Estate of Johnny Bailey, Rod Bernstine, Reatha Brown Individually and as the Representative of the Estate of Aaron Brown, Jr., Curtis Ceasar, Jr., Larry Centers, Trevor Cobb, Darrell Colbert, Elbert Crawford III, Christopher Crooms, Gary Cutsinger, Jerry W. Davis, Tim Denton, Leland C. Douglas, Jr., Michael Dumas, Corris Ervin, Robert Evans, Doak Field, James Francis, Baldwin Malcom Frank, Derrick Frazier, Murray Garrett, Clyde P. Glosson, Anthony Guillory, Roderick W. Harris, Wilmer K. Hicks, Jr., Patrick Jackson, Fulton Johnson, Richard Johnson, Gary Jones, Eric Kelly, Patsy Lewis Individually and as the Representative of the Estate of Mark Lewis, Ryan McCoy, Emanuel McNeil, Gerald McNeil, Jerry James Moses, Jr., Anthony E. Newsom, Winslow Oliver, John Owens, Robert Pollard, Derrick Pope, Jimmy Robinson, Glenell Sanders, Thomas Sanders, Todd Scott, Nilo Silvan, Matthew Sinclair, Dwight A. Scales, Richard A. Siler, Frankie Smith, Eric J. Swann, Anthony Toney, Herbert E. Williams, James Williams, Jr., Butch Woolfolk, Keith Woodside, Milton Wynn, and James A. Young, Sr., and their counsel, Lubel Voyles LLP, Washington & Associates PLLC, and The Canady Law Firm.

Specify who is suing whom, for what, and the subject of this action. Identify (1) the nature of the action; (2) the parties to this appeal; (3) the amount in controversy or other relief involved; and (4) the judgment or other action in the lower court or agency from which this action is taken:

This appeal, which is a companion to USCA No. 18-2012, presents a challenge to the district court's order (ECF 10019) allocating approximately $85.6 million in attorneys' fees from the previously-awarded $112.5 million attorneys' fees fund (ECF 9860/61).

This Court previously affirmed approval of the Settlement Agreement, which, among other things, established an Attorneys' Fees Qualified Settlement Fund ("Fee Fund") of $112.5 million. But, the Court did so without a specific award of fees. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F.3d 410, 436, 445 (3d Cir. 2016). Upon the effective date of the Settlement, Co-Lead Class Counsel petitioned the district court to (i) award the entire $112.5 Fee Fund as a substantial bonus for negotiating the "successful" Settlement Agreement and (ii) tax Class Members' recovery to pay for future fees. The district court granted those requests, in part, and also ordered a cap on private attorney fee contracts (ECF 9860-63). The district court's orders (i) awarding Class Counsel the entire $112.5 million Fee Fund, (ii) taxing all Class Members' recovery for future fees,[1] and (iii) capping all private attorney fee contracts are being challenged by Appellants in USCA No. 18-2012.

Subsequent to those orders, the district court entered an order allocating $85.6 million of the $112.5 million Fee Fund to 26 law firms. That order, from which this appeal is taken, is ECF 10019.

Short Statement of the factual and procedural background:

In April, 2016, this Court affirmed the district court's order granting a motion for class certification and final approval of a settlement between Former NFL Players and the National Football League in *In re NFL*, 821 F.3d at 436. As part of the decision, the Court approved severance of the "fairness of the settlement" from any question of attorneys' fees under Article XXI of the Settlement and thus no assessment of Class Counsel attorneys' fee was part of the Settlement. *Id.* at 445. In January 2017, the Settlement Agreement became final. Shortly thereafter, Co-Lead Class Counsel filed a petition for fees, requesting not only the entire $112.5 million Fee Fund, but also a full 5% tax on Class Members' recoveries. Appellants attempted to obtain an attorneys' fee Case Management Order, or "CMO," and limited fee discovery on Co-Lead Class Counsel's summary evidence. The district court rejected both. The district court then appointed an expert pursuant to Fed. R. Civ. P. 706 to render an opinion on the propriety of a 5% tax and a private fee cap, but not on the fee petition for $112.5 million. Over numerous and varied objections, the district court (i) granted the petition for the entirety of the fee request ($112.5 M); (ii) effectively ordered a 5% tax on Class Members' recoveries for future fees; and (iii) capped individually-

[1] To be clear, the district court has reserved judgment on the 5% set-aside requested by Co-Lead Class Counsel to pay for future fees (ECF 9860, at 2, 17-18). Nevertheless, and at the same time, the Court ordered that the 5% set-aside be withheld until this issue is resolved (*Id.* at 18, n. 12; *see also* ECF 9862, at 8, n. 5).

retained private attorney fee contracts. These orders are the subject of the related appeal, USCA No. 18-2012

Shortly thereafter, the district court entered an order allocating among 26 law firms approximately $85.6 million of the previously-awarded $112.5 million Fee Fund. Appellants immediately sought a stay of the allocation order pending appeal (ECF 10022). The district court denied that request (ECF 10042). Therefore, Appellants petitioned this Court for a stay of the distribution. In the interim, however, Co-Lead Class Counsel advised Appellants and this Court that "nearly $81 million of the [$85.6M]" allocated has already been distributed. Appellants therefore have requested for a stay order prohibiting any further distributions remains pending.

Identify the issues to be raised on appeal:

The issues is this appeal are intertwined with the issues raised in USCA No. 18-2012. Therefore, Appellants reurge them here:

First, the district court erred in granting C-Lead Class Counsel's fee petition by awarding the entire Fee Fund set aside by the NFL. The methodology of the award was incorrect; although this settlement involves neither a sum-certain award nor a class-wide guarantee of recovery of funds for listed compensable diseases, the district court used a percentage-of-the-recovery method to award a percentage of a settlement valued on *class registrations*, not class recovery. The district court determined, based upon the registrations, that the Settlement is worth $1.5 billion. But, the first-year track record of Settlement payments shows that the NFL will never pay anything approaching $1.5 billion.

Moreover, the record evidence was insufficient and methodologically unsound to support an award on any theory, and it was a violation of the open access doctrine and due process for the district court to rest a fee award on secret evidence. The district court performed a "lodestar check" based upon a *sua sponte* review of materials requested *ex parte* and review *in camera*. The district court then rejected its own expert's recommendation to hold and invest a small portion of the $112.5 million that would fund future fees, and granted the Petition for Fees *in toto*.

Second and third, the district court erred entering orders taxing 5% of all recoveries and capping private fees to 17%. By using a percent-of-recovery methodology, on a sixty-five year settlement incapable of reasonable valuation, the district court exhausted all funds set aside by the Settlement for attorneys' fees. Having exhausted the Fee Fund, the Court generated new money "as a precautionary measure" for future Class Counsel costs and fees. *In re Nat'l Football League Players Concussion Injury Litig.*, 2018 WL 1635648 *10 (E.D. Pa, April 4, 2018). Specifically, the Court ordered a (a) cap on private fee contracts and (b) a tax, by 5%, every dollar recovered by every Class Member to pay future fees and costs. The Court was without a proper motion or any competent evidence to support either order. The Court was without jurisdiction or authority to limit private fee contracts not placed before the Court.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	**Hon. Anita B. Brody**
THIS DOCUMENT RELATES TO: ALL ACTIONS	

EXPLANATION AND ORDER

On April 5, 2018, I issued a Memorandum Opinion awarding Class Counsel $106,817,220.62 in attorneys' fees. Today I address the allocation of those funds among Class Counsel for their work in securing the Settlement Agreement.

I. Background

This case began as an aggregation of lawsuits brought by former Players against the NFL Parties for head injuries sustained while playing NFL football. This Settlement was secured without formal discovery, with limited litigation of motions, and with no bellwether trials. Instead this case was litigated through negotiations that were supported by a creative legal framework that survived rigorous appellate challenge.

On January 31, 2012, the MDL was formed and proceedings were centralized in this Court. In July of 2013, I ordered the parties to engage in mediation and I appointed retired

United States District Court Judge Layn Phillips as mediator. ECF No. 5128. The parties worked intensely in this negotiation, at times around the clock. A Term Sheet was executed on August 29, 2013. ECF No. 5235.

Following the announcement of a term sheet, the parties continued to negotiate, working out the detailed terms of the Settlement Agreement. Recognizing the complicated financial aspects of the proposed settlement, I appointed Perry Golkin as Special Master to aid me in my evaluation. ECF No. 5607. On January 6, 2014, the parties submitted a motion for preliminary approval of a class action settlement. ECF No. 5634. Though I believed the efforts in the negotiation were commendable, I denied the motion because I had concerns about the cap on the Monetary Award Fund. ECF No. 5658.

Diligently, the parties returned to their negotiations, working intensely through June of 2014 to further analyze the economic data to construct a fund that would ensure payment to the class members over the full 65-year term of the Agreement. On June 25, 2014, the parties submitted a revised proposed Settlement Agreement, which provided an uncapped Monetary Award Fund. ECF No. 6073. As with the first proposed settlement, the parties chose to structure the case as a class action, which subjected the Settlement Agreement to the challenges of compliance with Federal Rule of Civil Procedure 23. On July 7, 2014, I granted preliminary approval. ECF No. 6083. I instructed Co-Lead Class Counsel to ensure that notice was given to the class, and I set a schedule for an objection procedure and a fairness hearing. ECF No. 6084.

After the Fairness Hearing, I ordered the parties to return to the bargaining table to consider making the following changes:

- Allow credit for Eligible Seasons when a Player was playing in the World League of American Football, the NFL Europe League, and the NFL Europa League;

- Revise the funding limitations to the BAP to ensure that all eligible players would receive a BAP baseline assessment;
- Revise the date for the Qualifying Diagnosis of Death with CTE;
- Add a hardship exemption for fee to appeal an award determination; and
- Allow a reasonable accommodation for *force majeure* type events that preclude class members from obtaining medical records.

ECF No. 6479.

On February 13, 2015, the parties agreed to the proposed changes and submitted an amended settlement. On April 22, 2015, I certified the class and approved the Settlement Agreement. ECF No. 6509.

Following my approval, Class Counsel turned their attention to the defense of the class certification under Rule 23 and the approval of the Settlement Agreement. On April 18, 2016, the Third Circuit Court of Appeals affirmed. *In re National Football League Players Concussion Injury Litigation,* 821 F.3d 410 (3d Cir. 2016). The Circuit Court's opinion was challenged through two petitions for writ of certiorari that were submitted to the United States Supreme Court. The petitions were denied on December 12, 2016. The Settlement became effective on January 7, 2017.

As a part of the Settlement Agreement, the NFL Parties agreed to pay $112.5 million dollars in fees to Class Counsel. On April 5, 2018, I approved Co-Lead Class Counsel's petition for the award of attorney's fees for the full amount. On that same date, I approved the incentive awards for class representatives and awarded the payment of $5,682,779.38 in expenses to Class Counsel. *In re National Football League Players' Concussion Injury Litigation,* No. 2:12-MD-02323-AB, 2018 WL 1635648 (E.D. Pa. April 5, 2018).

On September 11, 2017, I ordered Co-Lead Class Counsel, Christopher Seeger to submit a proposal for the allocation of lawyers' fees among Class Counsel. ECF No. 8367. Mr. Seeger

submitted a detailed proposal on October 10, 2017. ECF No. 8447. I also invited any party seeking payment of class benefit fees to submit a counter-declaration. ECF No. 8448. On May 15, 2018, I convened a hearing and allowed any party seeking class benefit payment the opportunity to explain their position and basis for the fee requests.[1]

In the April 5th Fee Opinion, I observed that a portion of the $112.5 million would be used to pay Class Counsel's fees for securing the Settlement Agreement and would be used for the implementation of the Settlement Agreement. Today I allocate $85,619,466.79 to Class Counsel for their work in securing the Settlement Agreement. I continue to hold the remaining funds in reserve to pay Class Counsel for their services in supporting the class through the implementation of the 65-year term of this Agreement.[2]

II. Discussion

This Settlement was obtained through a complex, multi-tracked mediation effort. It required a pioneering effort by Class Counsel, which allowed for the formation of a legally adequate class despite player differences. The relatively quick resolution allowed impaired Class Members to receive compensation and access to treatment as quickly as possible. The Parties made it clear to me that certification of this case as a class action was a keystone to negotiations. But, Rule 23 and the related case law made class certification in personal injury cases a challenge. Class Counsel's creativity in structuring a certifiable class against this legal landscape

[1] In advance of this hearing, I required all firms seeking payment for class benefit services to provide declarations related to the illegal assignment of Class Member Awards to Third-Party Funders. I have decided not to take action on that information at this time.

[2] The Settlement Agreement allowed for a reduction of individual Awards by up to 5% to pay implementation fees to Class Counsel. In my April 5, 2018 opinion, I indicated that I believed a determination of the need for additional funds was premature at this time. In an abundance of caution, I have instructed the Claims Administrator to hold 5% of all Awards in reserve. I will revisit Class Counsel's request for additional funds to be paid from that holdback at a later date.

and persuading this Court, the Third Circuit, and United States Supreme Court was groundbreaking.

Factors Considered in Calculation of the Multipliers

In his proposed allocation, Co-Lead Class Counsel indicated that he used three broad criteria in calculating his proposed allocation: (1) appointed leadership roles in the litigation; (2) "meaningful" involvement in the litigation from beginning to end; and (3) value of the contribution to the settlement negotiations and defense of the Settlement on appeal.

I will address Co-Lead Class Counsel's third factor first, because I believe it most important. Under present case law, establishing class certification under Rule 23 in mass tort cases is challenging. One of Class Counsel's most important contributions was the creation and negotiation of the necessary provisions that allowed for a settlement under these legal rigors. Class Counsel's innovative terms formed through rigorous negotiation and then defended at the appellate level were outstanding. I place a very high value on the legal acumen necessary to construct and defend this unique settlement.

Secondly, credit should be given to attorneys who were meaningfully involved in this litigation from the earliest stages through to the hard fought appeal. The lawyers that advanced the interests of the class for the full five years of negotiation and defense deserve to be compensated for this work.

Relatedly, several objectors have requested that I consider the common benefit work performed prior to the formation of the MDL. At the start of the MDL proceedings, I adopted the protocol proposed by Plaintiffs' leadership as it related to the submission of fees and expenses. Those regulations prohibited the submission of hours for work performed prior to the

formation of this MDL. ECF No. 3710. As is noted below, I have considered work done prior to the formation of the MDL through an increase in the firm's multiplier where applicable.

Finally, the fact that a firm has a leadership role in this MDL/Class Action is a factor that should be considered in the fee allocation. But, membership in the Plaintiff's Executive Committee (the "PEC") and the Plaintiff's Steering Committee (the "PSC"), standing alone, is insufficient to merit anything greater than a 1.0 "multiplier." In constructing the PSC and PEC, Plaintiffs provided a list of the tasks that were delegated to the PSC, almost all of which were never necessary to the advancement of this case. ECF No. 54, at 2-4. Thus, members of the PEC and PSC are entitled to payment for the work performed at reasonable billing rates, but, without more, are not entitled to an enhancement of those fees.

Some attorneys have argued that they incurred more risk by taking on large numbers of clients. They argue that their contribution of "critical mass" is a factor worthy of a multiplier. I disagree. Every attorney involved in this litigation has taken on the risk that work will be performed, but no payment will be received. Attorneys who worked a high number of hours advancing the interests of large numbers of clients certainly incurred great risk, but risk incurred for individuals must be paid by those individuals.[3] On the other hand, attorneys who worked a high volume of hours advancing the interest of the Class incurred a high risk for the Class. That is the type of risk that should be paid through a class benefit multiplier.

[3] Actually, as Professor Rubenstein noted, the economies of scale actually benefit firms that took on large volumes of clients. ECF No. 9526 at 32-33. Though these attorneys have taken on a greater volume of risk, they have actually taken on less risk on a client by client basis. Either way, this is risk attributable to their representation of individual clients, not their risk as it relates to the Class.

Billing Rates Used

As to the lodestars submitted here, I have previously expressed my concerns about the billing rates submitted by some firms. *See In re National Football League Players' Concussion Injury Litigation,* 2018 WL 1635648, *9. In seeking the appointment of the PEC and PSC, the attorneys indicated that they had "reached consensus to establish reasonable uniform hourly rates for all partners, associates and paralegals conducting work that benefits all plaintiffs for purposes of reimbursement for fees from the Common Benefit Fund and for lodestar check...." ECF No. 54. Despite this, the hourly rates submitted here were not uniform and these agreed rates have not been provided to the Court. The lodestars submitted break the hours worked into groups of partners, of counsel, associates, staff attorneys and contract attorneys, and paralegals. I have taken the average billing rate[4] for each of these categories to use as a reference. Where the overall firm rate has exceeded the rate using these averages, I have adjusted the billing rates. Where an adjustment is made, it is noted below.

The Process to Determine this Allocation

I concluded that this specific case would be most equitably resolved by allowing Co-Lead Class Counsel to recommend an allocation. I chose this approach because this case was resolved through intensive negotiations, as opposed to widely reviewed discovery, depositions, and bellwether trials. Co-Lead Class Counsel had a front row seat for the negotiations and the legal rigors of the appellate process. His perspective is unique and important. This approach is not unusual and has been endorsed by other courts, including courts in this district. *See, e.g., Milliron v. T-Mobile, USA, Inc.*, 423 F. App'x 131, 134 (3d Cir. 2011); *In re Processed Egg*

[4] The average billing rate for partners is $758.35. The average billing rate for "of counsel" attorneys is $692.50. The average billing rate for associates is $486.67. The average billing rate for contract attorneys is $537.50. The average billing rate for paralegals is $260.00.

Prods. Antitrust Litig., No. 08-2002, 2012 WL 5467530, at *7 (E.D. Pa. Nov. 9, 2012); *accord In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 343, 351-52 (E.D. Pa. 2004).

Since it is my obligation to "evaluate what Class Counsel actually did and how it benefitted the class," *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 342 (3d Cir. 1998), I asked Class Counsel to submit his recommendation and then allowed other attorneys to object to the proposed allocation, both in pleadings and in open court. The path of this litigation has also provided me with a very full picture of the roles and responsibilities of the different attorneys in this litigation. As a result, I believed that delegating the allocation to a special master or Magistrate Judge for a report was not advantageous.

The Firm-by-firm Fee Requests

I will address each firm in Co-Lead Class Counsel's fee petition in alphabetical order, setting out the amount of the allocation and the factual basis underlying my conclusion. I will then address the fee petitions of the Objectors.

1. Anapol Weiss.

Anapol Weiss made contributions to this litigation from its outset to its conclusion. I appointed Sol H. Weiss of Anapol Weiss as Co-Lead Class Counsel in this case, having been selected for that role by the PEC. ECF No. 72. Larry E. Coben was appointed to serve as a member of the PEC.

Anapol Weiss was actively involved in the construction and negotiation of the Settlement Agreement. As was reported by Co-Lead Class Counsel, Mr. Weiss "attended many of the settlement meetings and mediations with the NFL. Mr. Weiss, and his partner, Mr. Coben, assisted in negotiating the battery of tests for the BAP and dealt with other matters relating to the medical issues underpinning the Settlement. Mr. Weiss was active in the settlement process,

including review and comment on the drafts of the Settlement Agreement. Messrs. Weiss and Coben met with and assisted in preparing scientists and physicians who submitted declarations in support of the Settlement." ECF No. 8447, at 7.

Anapol Weiss was one of the firms involved in this litigation from start to finish. They were also responsible for filing the first federal case (*Easterling v. NFL*, Civil Action No. 11-5209) on August 17, 2011. Prior to the formation of the MDL, Anapol Weiss played a leadership role in bringing plaintiffs' counsel together. I have given some weight to this pre-MDL work in the calculation of their multiplier.

Anapol Weiss submitted 4,241.20 hours for a lodestar of $1,857,436.00. Based on the contributions and the nature of the work performed by Anapol Weiss, including the firm's pre-MDL work, I award them $4,643,590.00, which amounts a 2.5 multiplier on the firm's lodestar.

2. Casey Gerry Schenk.

David Casey was appointed to serve on the PSC. Mr. Casey and his partner, Fred Schenk also served on the Communications Committee. Co-Lead Class Counsel has recommended that work performed as a member of the Communications Committee is not enough, standing alone, to merit an enhancement through a multiplier. As discussed above, Co-Lead Class Counsel supervised all aspects of this settlement negotiation. I respect his unique position in evaluating the impact of the committee's work on the over-all settlement, and I accept his conclusion about the proper multiplier to be used.

Casey Gerry Schenk submitted 417.40 hours for a lodestar of $333,920.00. This lodestar utilized rates that exceeded the average rates I have identified. I award the firm $316,533.51, which is the full amount of the adjusted lodestar.

3. Dugan Law Firm.

James Dugan was selected to serve on the PSC and served on the Discovery and Preemption Committees.

The Dugan Law Firm submitted 293.90 hours for a lodestar of $188,340.50. I award the full amount of the firm's lodestar.

4. Girard Gibbs.

Daniel Girard and Amanda Steiner worked with Co-Lead Class Counsel, experts, and co-counsel to obtain Final Approval of the Settlement and assisted in the defense of the Settlement Agreement after Final Approval. I accept Co-Lead Class Counsel's characterization of the firm's contribution to the defense of the settlement, which I believe is one of the most complex aspects of the work done in this case.

Girard Gibbs submitted 373.10 hours for a lodestar of $279,489.00. I will award the firm $335,386.80, which amounts a 1.2 multiplier on the firm's lodestar.

5. Girardi Keese.

I appointed Thomas V. Girardi and Graham LippSmith of Girardi Keese to serve as members of the PEC. Additionally, Girardi Keese, along with Goldberg Persky & White and Russomanno & Borello, brought the first two cases that were filed in this litigation: *Maxwell v. NFL* (filed July 19, 2011) and *Pear v. NFL* (filed August 3, 2011).

The firm has submitted their pre-MDL hours as an exhibit to their objections. I have considered that submission and considered the work done by the firm prior to the formation of the MDL. This pre-MDL work has provided the basis for the multiplier that I have chosen.

This firm submitted 628.70 hours for a lodestar of $448,190.00. This lodestar utilized rates that exceeded the average rates I have identified. In consideration of the firm's leadership

on the PEC and their pre-MDL common benefit work, I award the firm $526,548.33, which amounts to a 1.2 multiplier on the adjusted lodestar.

6. Goldberg, Persky & White.

Goldberg, Persky & White was not a member of the PEC or the PSC, but the firm (along with Girardi Keese and Russomanno & Borello) filed the first two cases in this litigation: *Maxwell v. NFL* (filed July 19, 2011) and *Pear v. NFL* (filed August 3, 2011).

I am aware of Jason Luckasevic's work in mounting litigation against the NFL, including his relationship with Dr. Bennet Omalu, who was a pioneer in the discussion of CTE. This pre-MDL work has provided the basis for the multiplier that I have chosen.

Goldberg, Persky & White submitted 500.60 hours for a lodestar of $262,860.00. To ensure that the firm receives an appropriate value for their pre-MDL work, I award them $328,575.00, which amounts a 1.25 multiplier on the firm's lodestar.

7. Hagan, Rosskopf & Earle.

Bruce Hagen served on the Communications Committee of the PSC.

Mr. Hagen has submitted objections, documenting the various tasks he completed for the Communications Committee. I have reviewed these, but the arguments do not alter my belief that the services performed by members of the Communications Committee do not merit a multiplier. This is not to say that the work of the committee did not make a difference in this litigation. The issue here is whether that work made such a difference that counsel's ordinary fees should be subject to an enhancement. Upon review of all the pleadings (including the information presented by others who were members of the Communications Committee), I have concluded that membership in the Communications Committee, without more, is not entitled to a multiplier.

Hagen, Rosskopf & Earle submitted 540.80 hours for a lodestar of $324,480.00, which I award them in full.

8. Hausfeld.

I appointed Richard Lewis and Michael D. Hausfeld to serve as members of the PEC. Additionally, Hausfeld associate, Jeannine M. Kenney, served as the Court-appointed Plaintiffs' Liaison Counsel, and assisted Co-Lead Class Counsel in organizing communications with and between the PEC, the PSC and Co-Lead Class Counsel.

Mr. Lewis also served on the Legal Committee where he conducted factual and legal research in preparation for, and drafting of, the Master Administrative Personal Injury and Medical Monitoring Class Action Complaints, and opposing the NFL Parties' efforts to dismiss Plaintiffs' claims.

Hausfeld submitted 1,281.80 hours for a lodestar of $763,917.50. This lodestar utilized rates that exceeded the average rates I have identified. I award the firm $914,903.77, which amounts a 1.3 multiplier on the adjusted lodestar.

9. Herman, Herman & Katz.

At the direction of Co-Lead Class Counsel, Herman Herman & Katz provided research and preparation of materials applicable to the cause and treatment of concussions that assisted in the development of the terms and conditions of the Settlement. The firm was uniquely positioned to assist through the aid of Joseph Kott, who brought the experience of over 20 years of practicing neurosurgery prior to becoming of counsel.

Herman Herman & Katz submitted 136.30 hours for a lodestar of $89,660.00. I award the full amount of the firm's lodestar.

10. Professor Samuel Issacharoff.

One of the keystones to this litigation was overcoming the challenge presented by Rule 23 in the personal injury context. In hindsight, it is clear that this was not an insurmountable obstacle. The creative construction of the Settlement Agreement as well as an intelligent approach to the case law made the defense of this Settlement look almost easy. But, that hindsight cannot control our evaluation. The Settlement in this case was a pioneering effort, not just on the science, but also on the law.

Professor Issacharoff's persuasive appellate advocacy and knowledge of class action jurisprudence was invaluable to the Class. Though Professor Issacharoff's presence is most obviously seen in his appellate pleadings and argument, that contribution was only part of his work. As Co-Lead Class Counsel explains, Professor Issacharoff was influential in the settlement negotiations, which were conducted with an eye toward the potential Rule 23 issues. ECF No. 8447, at 9.

Several objectors take issue with the multiplier proposed by Co-Lead Class Counsel. These arguments arise out of a fundamental misunderstanding of the nature of the agreement that was reached in this case. Settlement required the creation of a class. The complexity of the law in this area required an expert who could help construct an agreement that would withstand the rigors of the appellate process. If that process looked easy, it was due to Professor Issacharoff's skill.

Professor Issacharoff submitted 801.75 hours for a lodestar of $800,512.50. As a member of the "team," however, the professor was obligated to comply with the same restrictions on billing rates as law firms seeking common benefit payments. I have, therefore,

adjusted the billing rates used to comply with the average rate I used for billing by law firm partners. I award $1,976,012.00, which amounts a 3.25 multiplier on the adjusted lodestar.

11. Kreindler & Kreindler.

Anthony Tarricone co-chaired the Communications Committee of the PSC, which was an active committee during the negotiations and in the public defense of the Settlement. As Co-Lead Class Counsel explained, "Mr. Tarricone helped develop an effective media campaign to ensure the dissemination of accurate information to interested media, and counter misinformation concerning the Settlement to potential class members." ECF No. 8447, at 9.

The objections submitted by Mr. Tarricone, along with the objections submitted by the other members of the Communications Committee, have provided me with a full picture of the work performed by the committee. Co-Lead Class Counsel has also presented me with detailed information on his views related to the impact of the Communications Committee on the overall litigation. Mr. Tarricone was co-chair of the committee and for that leadership I believe that he is entitled to a multiplier. Other than the firms that I appointed as Class Counsel and Professor Issacharoff, no firm will be paid more than the Kreindler firm. It is entirely clear to me that this payment is well-earned. It is equally clear to me that a higher multiplier is not appropriate.

Kreindler & Kreindler submitted 1,573.00 hours for a lodestar of $1,258,400.00. This lodestar utilized rates that exceeded the average rates I have identified. I award the firm $1,491,097.30, which amounts to a 1.25 multiplier on the adjusted lodestar.

12. Levin Sedran & Berman.

Levin Sedran & Berman provided meaningful support of this litigation from start to finish. Arnold Levin was selected to serve as a member of the PSC, and was later appointed Subclass Counsel for Subclass 1. Mr. Levin was an active participant in the negotiations that led

to the Settlement Agreement. Co-Lead Class Counsel credits Mr. Levin with his role in the negotiations regarding "class and subclass definitions, a preliminary injury grid, and foundation for the Baseline Assessment Program." ECF No. 8447, at 9. Additionally, Mr. Levin and Sandra L. Duggan assisted with negotiations related to players in Subclass 2 with Dianne Nast, Subclass Counsel for Subclass 2.

At the direction of Co-Lead Class Counsel, the firm assisted with research on a number of topics relevant to the strength and viability of Plaintiffs' claims, including medical monitoring, tolling, preemption, and fraudulent concealment, while assisting in the preparation of the Master Administrative Personal Injury and Medical Monitoring Class Action Complaints. The firm continued its support of the Settlement through Rule 23 appeals and arguments to the Third Circuit.

This firm submitted 4,862.75 hours for a lodestar of $4,573,438.75. This lodestar utilized rates that exceeded the average rates I have identified. I award the firm $8,411,720.45, which amounts a 2.25 multiplier on the adjusted lodestar.

13. Locks Law Firm.

The Locks Law Firm was involved in the leadership of this litigation. I appointed Gene Locks and David Langfitt to serve as members of the PEC. Later in the litigation I appointed Mr. Locks to serve as Class Counsel. Mr. Langfitt worked with two other PEC members to draft the Master Administrative Personal Injury and Medical Monitoring Class Action Complaints, and was involved in preparing the opposition to the NFL's motion to dismiss on the grounds of preemption.

Though present early in this litigation, the firm's role did not continue throughout the appellate support of the Settlement. I accept Co-Lead Class Counsel's assessment that the firm

did not play an active role in either the settlement negotiations or the defense of the Settlement on appeal. I also have to respect Co-Lead Class Counsel's concerns about the impact of Mr. Locks' interview with *Businessweek*, since Co-Lead Class Counsel led the negotiations with the NFL and is best positioned to advise me on this matter.

Ultimately, I conclude that the Locks firm is entitled to a multiplier for the leadership role they played in this litigation, but their failure to provide meaningful support for other crucial aspects of this process is the basis for the multiplier that I have chosen. The firm, however, will be compensated more than $3.8 million for their services – only four other firms will receive a higher payment from the common benefit fund.

The Locks Law Firm submitted 4,243.00 hours for a lodestar of $3,084,500.00. I award the firm $3,855,625.00, which amounts a 1.25 multiplier on the firm's lodestar.

14. McCorvey Law.

Derriel McCorvey was selected to serve on the PSC. Mr. McCorvey also served on the Communications Committee. The firm, like many others, stood ready to perform additional work, but none was assigned because of the nature of this Settlement. I have no doubt that McCorvey Law could have provided additional positive support had this litigation taken a different path. Ultimately, however, I must assess the work actually performed.

McCorvey Law submitted 331.30 hours for a lodestar of $198,780.00. I award the full amount of the firm's lodestar.

15. Mitnick Law.

Mitnick Law was not a member of the PEC or PSC, but served at the direction of Co-Lead Class Counsel in the multi-faceted outreach efforts to the Retired NFL Player Community, including in person events with alumni and other NFL players' associations.

Mitnick Law submitted 1,198.15 hours for a lodestar of $898,612.50. Co-Lead Class Counsel proposed multiplier of .75 for Mitnick Law's allocation in this matter. Though Mr. Mitnick initially submitted objections to the proposed allocation, he subsequently *withdrew* those objections, stating, "After much thought and deliberation, I have realized how much time and energy Mr. Seeger and his firm have put into the NFL concussion litigation, its successful resolution and their recommendation for the allocation of common benefit fees. If not for Mr. Seeger's efforts, there is no doubt that this case would have never materialized as quickly as it did." ECF No. 8917.

Despite withdrawing his objection, Mitnick Law submitted a fee petition on May 11, 2018 and appeared before me on May 15, 2018 to argue for fees beyond those recommended by Co-Lead Class Counsel. The time for submitting fee petitions has long passed. I set a deadline of October 27, 2017 for the submission of all requests for fees. ECF No. 8448. Yet in the interest of fairness, I have reviewed the fee petition and I have considered Mr. Mitnick's "objections" submitted during the May 15, 2018 Hearing. I have also reviewed Co-Lead Class Counsel's explanation of the impact of the work performed by Mitnick Law. I do not find Mr. Mitnick's arguments persuasive.

I award Mitnick Law $673,959.38, which amounts a .75 multiplier on the adjusted lodestar.

16. NastLaw.

NastLaw provided strong leadership throughout this litigation. Dianne Nast was selected to serve as a member of the PSC, and was later appointed to serve as Subclass Counsel for Subclass 2.

Co-Lead Class Counsel credits NastLaw as one of only six firms that "made contributions from the outset of the litigation all the way to its end." ECF No. 8447-2 at 4. The firm was actively involved from the outset of the litigation, including preparation for, and drafting of, the Master Administrative Personal Injury and Medical Monitoring Class Action Complaints and opposing the NFL Parties' efforts to dismiss Plaintiffs' claims. Ms. Nast participated in settlement negotiations with the NFL Parties as counsel for Subclass 2. The firm also supported efforts in defending the Settlement after Preliminary Approval.

Nast Law submitted 1,211.75 hours for a lodestar of $765,060.25. This lodestar utilized rates that exceeded the average rates I have identified. I award the firm $1,090,636.06, which amounts a 1.5 multiplier on the adjusted lodestar.

17. Podhurst Orseck.

Podhurst Orseck supported the Settlement in all three important phases in the litigation. I appointed Stephen Marks and Ricardo M. Martinez-Cid to serve as members of the PEC. Later in the litigation, I appointed Mr. Marks to serve as Class Counsel. Mr. Marks served as co-chair of two committees, including the Communications Committee, Mr. Martinez-Cid also served as co-chair of two committees, and Stephen Rosenthal serves as one of the co-chairs of the Legal Committee, which drafted the Master Administrative Personal Injury and Medical Monitoring Class Action Complaints and opposition to the NFL Parties' efforts to dismiss Plaintiffs' claims. Podhurst was counsel for two individuals who served as Class Representatives in this matter.

Podhurst provided meaningful contributions throughout this litigation. Co-Lead Class Counsel credits Mr. Marks with his important work during settlement negotiations, including in early face-to-face negotiations with the NFL Parties. Also, importantly, Mr. Marks and his firm continued to provide support for the Settlement through Final Approval.

Podhurst Orseck submitted 4,510.80 hours for a lodestar of $3,005,744.50. This lodestar utilized rates that exceeded the average rates I have identified. I award the firm $6,048,169.49, which amounts a 2.25 multiplier on the adjusted lodestar.

18. Pope McGlamry.

Mike McGlamry was selected to serve as a member of the PSC. Mr. Glamry served on the Communications Committee. Several of the firm's shareholders served on a variety of committees and would certainly have provided important services to the Class had this litigation taken a different path to resolution. However, I agree with Co-Lead Class Counsel's conclusion that the firm's ultimate role was not significant enough to merit a multiplier.

Pope McGlamry submitted 1,274.90 hours for a lodestar of $829,030.00. I award the full amount of the firm's lodestar.

19. Rheinhart Wendorf & Blanchfield.

Garrett Blanchfield served on two committees. The firm submitted 23.10 hours for a lodestar of $14,899.50. I award the firm $11,174.63, which amounts a .75 multiplier on the submitted lodestar.

20. Rose, Klein & Marias

David Rosen was selected to serve on the PSC and served on the Communications Committee, the Workers' Compensation Committee, and the Lien and Ethics Committees. I have already addressed both Co-Lead Class Counsel's explanation and my conclusion about the role of the Communications Committee. As to the additional committees referenced, these groups did not provide the type of support of the Settlement that would entitle counsel to a multiplier.

The firm submitted 243.03 hours for a lodestar of $157,969.50. I award the full amount of the firm's lodestar.

21. Seeger Weiss

Because of the path taken by this litigation, the role played by Seeger Weiss was more significant than other firms. Following the Initial Organizational Conference, I appointed Chris Seeger to be Co-Lead Class Counsel in this litigation. ECF No. 64. I also appointed Seeger Weiss partner David Buchanan to serve as a member of the PEC.

Mr. Seeger led the negotiations that resulted in this historic settlement. Mr. Seeger and Mr. Buchanan led every session of negotiations with the NFL Parties. And they led every meeting of plaintiffs' counsel who assisted in the development of the Settlement Agreement.

Seeger Weiss played a key role in evaluating the complex legal issues of this case and defending the case on appeal. Upon recognizing the potential legal issues related to negotiating the Settlement under Rule 23, Seeger Weiss brought in the necessary experts to help frame the Settlement and position it effectively for the appeal. After successfully arguing for Preliminary and Final Approval of the Settlement, including the negotiation of amendments to the Settlement Agreement, Seeger Weiss took the lead in defending the Settlement on appeal. The firm worked closely with Professor Issacharoff in defending the class action settlement on appeal, up through denial of *certiorari* review by the United States Supreme Court.

Seeger Weiss has submitted 21,044 hours of fees, more than four times that submitted by other firms.[5] Some objectors have attempted to argue that Seeger Weiss did not bear much risk in this litigation. The billable hours submitted in this case speak for themselves. Collectively

[5] Attorneys from six firms were appointed to be class counsel in this litigation. The collective hours of all five remaining firms is less than the hours submitted by Seeger Weiss.

Class Counsel submitted 51,068 hours in lodestar. That is to say that all of the firms that submitted lodestar fees risked that more than fifty-one thousand hours of work would go unpaid. That is a great risk, but it is shared among a large group. Seeger Weiss, individually, risked that more than twenty-one thousand hours of work committed to this litigation would go unpaid. That is almost half of the total risk taken on behalf of the class.

This risk did not dissipate prior to the conclusion of the appeals in this case. Seeger Weiss and Professor Issacharoff constructed a landmark legal theory to defend the settlement of this personal injury case as a class action. This was a great legal challenge that was remarkably well orchestrated both in the design of the Settlement and in the outstanding appellate advocacy that supported it.

Seeger Weiss has submitted 21,044 hours for a lodestar of $18,124,869.10.[6] This lodestar utilized rates that exceeded the average rates I have identified. I award the firm $51,737,185.70, which amounts to a 3.5 multiplier on the submitted lodestar.

22. The Brad Sohn Law Firm

Brad Sohn assisted the Ethics Committee on various matters. The Brad Sohn Law Firm submitted 50.00 hours for a lodestar of $26,250.00. I award them $19,687.50, which amounts a .75 multiplier on the firm's lodestar.

23. Spector Roseman Kodroff & Willis

William Caldes, of Spector Roseman Kodroff & Willis, served on two committees. The firm submitted 74.40 hours for a lodestar of $51,708.00. I award them $38,781.00, which amounts a .75 multiplier on the firm's lodestar.

[6] After the effective date of the settlement, Seeger Weiss has continued to provide services for the class. As set forth below, these bills will be submitted separately at a later date.

24. Zimmerman Reed

Charles Zimmerman was selected to serve as a member of the PSC and he served on the Ethics Committee.

The firm has argued that it is entitled to credit for pre-MDL work, noting that it had "formulated a case theory and filed [their] first complaints" by December of 2011. But the early submissions in this case were filed months before that – in July and August of 2011. By December of 2011, Plaintiffs' organizational meetings were already being held and the *Maxwell* and *Pear* cases were actively moving forward. The firm notes its participation in the *Dryer* litigation in 2009, but it is hard to understand how work on that entirely separate litigation should be a common benefit consideration in this litigation. I have considered this contribution in my calculation of fees for the firm.

Zimmerman Reed submitted 1,106.50 hours for a lodestar of $885,907.25. This lodestar utilized rates that exceeded the average rates I have identified. I award the firm $811,600.87, which is the full amount of the adjusted lodestar.

25. Faneca Objectors.

The Faneca Objectors have submitted a separate fee petition in this matter (ECF No. 7070), as well as objections to the allocation proposal submitted by Co-Lead Class Counsel. These Objectors claim that the final settlement incorporated four key elements that have roots in their objections:

- Credit for NFL Europe;
- The Uncapping of the BAP Fund;
- Expansion of the death with CTE qualifying diagnosis; and
- Elimination of the appeal fee in cases of hardship.

For these services, the Faneca Objectors seek $20 million for fees and expenses, which is 16.3% of the $122.6 million in value the Objectors' claim they secured for the class. While the amount sought by the Faneca Objectors is unreasonable, they are entitled to compensation for the work they performed for the class.

I appointed the firms representing the Faneca Objectors as Court-appointed liaisons to coordinate the arguments of the Objectors at the November 19, 2014 Fairness Hearing. ECF No. 6344. The firms provided a service to the Court by serving in that leadership role.

In consideration of the service provided as liaison counsel and the firms' role in providing benefits to the class, I award $350,000.00 to the firms that represented the Faneca Objectors.

26. Armstrong Objectors.

The Armstrong Objectors have submitted a separate fee petition in this matter (ECF No. 7232), as well as objections to the allocation proposal submitted by Co-Lead Class Counsel. These Objectors claim that they should be credited with many of the improvements that were also submitted by the Faneca Objectors.

I reject the claims submitted by the Armstrong Objectors. The Armstrong Objectors cannot receive credit for parroting the same objections that were made more persuasively by the Faneca Objectors.

I deny the fee petition submitted by the Armstrong Objectors.

27. Alexander Objectors.

The Alexander Objectors have filed repeated and largely redundant pleadings seeking fees for themselves and objecting to the fee petition submitted by Co-Lead Class Counsel. The firm has argued that they have provided "well over 1,000 hours attempting to improve the terms

of the settlement." ECF No. 8725, at 9-10. I have reviewed all of the pleadings filed by the Alexander Objectors and conclude that the arguments are too voluminous to restate here. Common benefit attorneys do not receive fees for unsuccessful appeals and unsuccessful objections. For that reason, the fee petition from the Alexander Objectors must be rejected.

28. Jones Objectors.

The Jones Objectors have submitted a separate fee petition in this matter (ECF No. 7364, 7555), as well as objections to the allocation proposal submitted by Co-Lead Class Counsel.

The Jones Objectors argue that they should be given fees for their objection that resulted in credit for seasons played in NFL Europe. As I have already indicated, the Faneca Objectors are entitled to credit for their work in presenting the NFL Europe objection. A comparison between the argument presented by the Faneca Objectors (ECF No. 6201 at 34-36) and the argument presented by the Jones Objectors (ECF No. 6235 at 3) speaks for itself.

I deny the fee petition submitted by the Jones Objectors.

29. Corboy & Demetrio.

Co-Lead Class Counsel has requested an allocation to Corboy & Demetrio for their work in supporting and defending the Settlement. The firm represented objectors to the initial Settlement Agreement, but ultimately worked with Class Counsel in support of the Settlement and defense of it on appeal.

I award the firm $250,000.00.

Total Payments at the Present time

As is set forth above, I approve the payment of $85,619,446.79 of the $112.5 million that I approved for payment of fees for class benefit.

At the May 15, 2018 hearing, Co-Lead Class Counsel provided me with an accounting of the funds available at the present time. $108,442,700.12 is available to pay Class Counsel for services. Accordingly, after today's allocation, $22,823,253.33 will remain in the common benefit fund. I will continue to hold these funds in reserve to pay common benefit fees as attorneys continue to work to implement this Settlement Agreement.

Class Counsel has already performed substantial work for the class in implementing this Settlement Agreement. I ask Co-Lead Class Counsel to submit a petition detailing the fees for the class benefit work that has been performed since the Effective Date of the Settlement Agreement. Going forward, fee petitions for the work done in implementing the settlement should be submitted by Co-Lead Class Counsel as he deems appropriate, but at least every six months. Class Counsel should adopt the blended billing rates used in the present allocation. In the future, Class Counsel may petition the Court for an increase in the standard billing rates, if he determines that such increase is necessary. These implementation fees will be paid on a straight lodestar basis, without the use of a multiplier.

III. Conclusion

For these reasons, I allocate $85,619,446.79 of common benefit funds to pay attorneys for their work in obtaining the Settlement in this case. I will hold in reserve the additional funds to pay for fees incurred in implementing the Settlement Agreement.

And now, this ____ day of May, 2018, it is **ORDERED** that the Fund Administrator for the Attorneys' Fees Qualified Settlement Fund ("AFQSF") shall pay each of the firms listed below the amounts, as set forth below, from the AFQSF:

Anapol Weiss $4,643,590.00

Casey Gerry Schenk $316,533.51

Dugan Law Firm $188,340.50

Girard Gibbs.....$335,386.80

Girardi Keese.....$526,548.33

Goldberg, Persky & White.....$328,575.00

Hagen, Rosskopf & Earle.....$324,480.00

Hausfeld.....$914,903.77

Herman Herman & Katz.....$89,660.00

Professor Issacharoff.....$1,976,012.00

Kreindler & Kreindler.....$1,491,097.30

Levin Sedran & Berman.....$8,411,720.45

Locks Law Firm.....$3,855,625.00

McCorvey Law.....$198,780.00

Mitnick Law.....$673,959.38

NastLaw.....$1,090,636.06

Podhurst Orseck.....$6,048,169.49

Pope McGlamry.....$829,030.00

Rheinhart Wendorf & Blanchfield.....$11,174.63

Rose, Klein & Marias.....$157,969.50

Seeger Weiss.....$51,737,185.70

Brad Sohn Law Firm.....$19,687.50

Spector Roseman Kodroff & Willis.....$38,781.00

Zimmerman Reed.....$811,600.87

Faneca Objectors.....$350,000.00

Corboy & Demetrio.....$250,000.00

It is further **ORDERED** that each of the law firms listed above shall cooperate with the Fund Administrator of the AFQSF to effectuate this Order.

s/Anita B. Brody

ANITA B. BRODY, J.

5/24/2018

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	**Hon. Anita B. Brody**
THIS DOCUMENT RELATES TO: ALL ACTIONS	

April 5, 2018 **Anita B. Brody, J.**

MEMORANDUM

Over the past year, the Court has focused on the implementation of the Settlement Agreement. Now that implementation is in progress, it is time to focus on attorneys' fees. There are four key issues for the Court to decide:

(1) the total amount for the common benefit fund;

(2) the allocation of the common benefit fund among Class Counsel;

(3) the amount, if any, to be set aside for attorneys' fees incurred in the implementation of this complex Settlement Agreement and the possible need for future attorneys' fees throughout the 65-year term of the Agreement; and

(4) the reasonableness of the amount of fees to be paid by individual Class Members from their Monetary Awards to individually retained plaintiffs' attorneys ("IRPAs").

In this opinion, I will address the first issue, the total amount for the common benefit fund. The fourth issue, relating to IRPA contingent fee agreements will be addressed in another

opinion also filed today. The second and third issues relating to allocation and funding for future implementation will be determined at a later date.

Class Counsel has petitioned the Court for $112.5 million in reasonable costs and attorneys' fees. I will award to Class Counsel the requested amount comprised of $106,817,220.62 in attorneys' fees and $5,682,779.38 in costs. The attorneys' fee portion of the award amounts to approximately 11% of the total value of the Settlement.

Class Counsel also has petitioned the Court to holdback 5% of all Monetary Awards to pay for past and future work implementing the Settlement. I currently do not have enough information to predict the amount of compensation Class Counsel will need for implementation. Therefore, as a precaution, I reserve judgment on the holdback request, and the Claims Administrator will continue to holdback 5% of each Award.[1]

I. BACKGROUND

This case began as an aggregation of lawsuits brought by former Players against the NFL Parties for head injuries sustained while playing NFL football. On January 31, 2012, the MDL was formed and proceedings were centralized in this Court. The parties spent almost two years briefing complex motions to dismiss and engaging in intense negotiations before a preliminary class action settlement was submitted for approval. On January 14, 2014, the Court denied preliminary approval over concerns as to the adequacy of the proposed $675 million settlement fund in light of uncertainty regarding the magnitude of damages.

On April 22, 2015, after crucial revisions were made to the Settlement, the Court granted final approval under Federal Rule of Civil Procedure 23(b)(3). The revised Settlement Agreement established an *unlimited* fund to compensate retired NFL Players, valued then at

[1] The Court hopes to address this issue once more data regarding the scope of implementation work is available—ideally in one year.

close to $1 billion. The Agreement also included other benefits to Class Members such as an uncapped Baseline Assessment Program, valued at $75 million, a $10 million Education Fund, and funding for a Claims Administrator to process Monetary Awards.

The Settlement Agreement also provided for the NFL Parties to pay "Class Counsel's attorneys' fees and reasonable costs," without objection, up $112.5 million. Settlement Agreement § 21.1, ECF No. 6481-1 at 77-78. This same provision of the Settlement Agreement allowed Class Counsel to petition the Court for a holdback "up to five percent (5%) of each Monetary Award and Derivative Claimant Award to facilitate the Settlement program and related efforts of Class Counsel." *Id.* at 78.

On April 18, 2016, the Third Circuit approved the Settlement Agreement. Petitions for review by the United States Supreme Court were sought by objectors and denied. On January 6, 2017, the Agreement became final upon the expiration of the time to file a Supreme Court rehearing petition.

On February 13, 2017, Co-Lead Class Counsel filed a fee petition, on behalf of the entire Class Counsel, seeking the full $112.5 million provided for by the Settlement Agreement for reasonable expenses and attorneys' fees. Fee Petition Mem. 3, ECF No. 7151-1. The petition filed by Co-Lead Class Counsel also seeks the 5% holdback of each Monetary Award to pay for costs and fees associated with implementing the Settlement.[2] In response to Co-Lead Class Counsel's petition, more than 20 objections were filed, with most of the concerns relating to the 5% holdback request. On April 10, 2017, Co-Lead Class Counsel filed an Omnibus Reply to all objections. Omnibus Reply, ECF No. 7464. A request for discovery related to the fee petition was also filed by an objector, and Co-Lead Class Counsel responded.

[2] Because of this pending request, the Claims Administrator has been withholding 5% of all Monetary Awards while awaiting the Court's decision on this issue.

The Court appointed Professor William B. Rubenstein of Harvard Law School as an expert witness on attorneys' fees, covering the issues of (1) fees to be paid to individually retained plaintiffs' attorneys ("IRPAs") and (2) Class Counsel's 5% holdback request. Professor Rubenstein then issued an Expert Report covering those topics. *See* Expert Report, ECF No. 9526. Interested parties were given the opportunity to respond to the Expert Report. Professor Rubenstein then filed a reply to the interested parties' responses to the Expert Report. Expert Reply, ECF No. 9571. Lastly, several interested parties filed sur-replies to Professor Rubenstein's reply.

The implementation process has been ongoing for over a year. The Monetary Awards claims process began accepting claims on March 23, 2017, and, as of this date, the Claims Administrator has issued notices of payable Monetary Awards in 369 claims for a total value of over $400 million. *See* NFL Concussion Settlement Website, https://www.nflconcussionsettlement.com (last visited April 4, 2018). With money now flowing to Class Members, it is appropriate for the Court to compensate Class Counsel.

II. DISCUSSION

Federal Rule of Civil Procedure 23(h) states that a "court may award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Thus, "a thorough judicial review of fee applications is required in all class action settlements." *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819 (3d Cir. 1995). The duty to review fee applications "exists independently of any objection." *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 730 (3d Cir. 2001) (quoting *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328–29 (9th Cir.1999)).

This Court is obligated to protect the interests of the Class, "acting as a fiduciary for the class." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307-08 (3d. Cir. 2005) (citing *Cendant*, 264

F.3d at 231); *Report of the Third Circuit Task Force, Court Awarded Attorney's Fees,* 108 F.R.D. 237, 251 (1985). The Settlement Agreement is in accord, stating that disbursement of attorneys' expenses and fees is "subject to the approval of the Court." Settlement Agreement § 21.1, ECF No. 6481-1, at 78. Here, the Parties agreed that the NFL would pay up to $112.5 million in expenses and fees without objection, and Class Counsel has requested that exact amount.

A. Expenses

Class Counsel has requested the payment of $5,682,779.38 in expenses. Consistent with my fiduciary obligation to review all of Class Counsel's fee requests, I have reviewed the expenses submitted and concluded that they are reasonable. There have been no objections to the expenses requested by Class Counsel. Hence, I will award Class Counsel reimbursement for the expenses submitted.

B. Attorneys' Fees

Class Counsel has requested $106,817,220.62 in attorneys' fees, which represents approximately 11% of the value of the Settlement Agreement. I will award Class Counsel the requested amount.

There are two methods for determining the reasonableness of attorneys' fees in class actions cases: (1) percentage-of-recovery and (2) lodestar. The use of each varies based on the type of litigation. "Common fund cases . . . are generally evaluated using a 'percentage-of-recovery' approach, followed by a lodestar cross-check." *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 496 (3d Cir. 2017) (citation omitted).

Where, as here, a defendant has voluntarily undertaken the establishment of a separate fund to pay class counsel's costs and fees, the case is most appropriately reviewed as a common fund case. *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d

283, 333-34 (3d Cir. 1998); *GM Trucks,* 55 F.3d at 822. Therefore, I will evaluate the request in this case as a common fund by using the percentage-of-recovery approach with a lodestar cross-check.

1. Percentage-of-Recovery

The award in this case produces a reasonable percentage-of-recovery of 11%. The percentage-of-recovery approach "compares the amount of attorneys' fees sought to the total size of the fund." *Halley*, 861 F.3d at 496. To determine if the percentage chosen is reasonable, a court must apply the factors found in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000) and *Prudential*, 148 F.3d at 338–40, which are:

> (i) the size of the fund created and the number of persons benefitted;
>
> (ii) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;
>
> (iii) the skill and efficiency of the attorneys involved;
>
> (iv) the complexity and duration of the litigation;
>
> (v) the risk of nonpayment;
>
> (vi) the amount of time devoted to the case by plaintiffs' counsel;
>
> (vii) the awards in similar cases;
>
> (viii) the value of benefits attributable to the efforts of Class Counsel relative to the efforts of other groups, such as government agencies conducting investigations;
>
> (ix) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained; and
>
> (x) any innovative terms of settlement.

Halley, 861 F.3d at 496 (summarizing the *Gunter/Prudential* factors).

After a review of all ten factors, I conclude that the balance weighs in favor of awarding $106,817,220.62 million to Class Counsel in attorneys' fees. The performance of Class Counsel

regarding this complex Settlement Agreement has been extraordinary. The fees requested here are well-earned.

i. Size of the fund created and the number of persons benefitted

Evaluation of this first factor begins with an assessment of the overall value of the Settlement and the number of individuals that benefitted from the class action. There are more than 20,000 Class Members registered to participate in this Settlement.[3] To date, more than 369 claims have been approved worth over $400 million.

The Monetary Award Fund in the Settlement Agreement is uncapped, requiring its value to be estimated using actuarial projections. The actuarial materials for both Class Counsel and the NFL were shared during negotiations and were made publically available. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 364 (E.D. Pa. 2015), *amended sub nom. In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-MD-02323-AB, 2015 WL 12827803 (E.D. Pa. May 8, 2015). An updated analysis was provided in April 2017, which accounted for additional data on registration rates. Initially, the Monetary Award Fund was valued at $950 million. The revised estimate places the value at over $1.2 billion[4] due to higher than expected registration. Importantly, any risk that the Fund is undervalued by the actuarial estimates is borne by the NFL. Therefore, if the level of injury or participation rate is higher than predicted, the value to Class Members will increase accordingly.[5]

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[3] The deadline to register in the Settlement has passed. The Settlement does allow for late registration upon a showing of good cause.

[4] The net present value of the estimated Monetary Award Fund is $785 million. Co-Lead Class Counsel Response to Expert Report 4, ECF No. 9552-1.

[5] Additionally, the uncapped Monetary Award Fund will also be used to pay costs to compensate the Special Masters, the Appeals Advisory Panel, and the Lien Resolution Administrator. The fees for these services were not calculated as a part of the value of the

To fully value the entire Settlement, however, the value of the Monetary Award Fund needs to be combined with the value created by five other provisions: the Baseline Assessment Program, the Education Fund, Notice Costs, Claims Administration, and the Attorneys' Fees Provision. The updated actuarial analysis including these values shows that the total estimated value of the Settlement is approximately $1.5 billion. Co-Lead Class Counsel Response to Expert Report 4, ECF No. 9552-1. To properly value the 65-year Settlement for our purposes though, this Court must use the net present value of the Settlement, which is $982.2 million. *Id.*

ii. Presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel

In evaluating the second factor, I must consider the presence or absence of substantial objections to the Settlement terms and Class Counsel's fee request. As this Court and the Third Circuit have already indicated, the Class reacted favorably to the terms of the Settlement Agreement. Only approximately 1% of Class Members filed objections and only 1% opted out. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 438 (3d Cir. 2016), *as amended* (May 2, 2016). As noted above, more than 20,000 Class Members have registered, exceeding the initial actuarial estimates. The positive response is all the more significant because the details of the terms of this Settlement Agreement were widely known and information was made broadly available, thereby allowing well-informed registration decisions.

There are approximately twenty objections to Class Counsel's fee petition. The vast majority of these objections relate to Class Counsel's request for a 5% holdback of Monetary Awards to pay for implementation work. Those objections have been considered, and the Court

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Monetary Award Fund in the actuarial estimates. These services provide even more value for the Class that is not accounted for in the $1.2 billion estimate.

is reserving decision on Class Counsel's request for a 5% holdback. Thus, many of the concerns raised by the objectors will be addressed at a later date.

Overall, the response to both the Settlement Agreement and to Class Counsel's fee petition has been largely positive. This factor weighs in favor of granting the requested fee award.

iii. Skill and efficiency of the attorneys involved

In approving the Settlement Agreement, I noted that "[n]o Objector challenges the expertise of Class Counsel. Co–Lead Class Counsel Christopher Seeger has spent decades litigating mass torts, class actions, and multidistrict litigations. . . . Co–Lead Class Counsel Sol Weiss, Subclass Counsel Arnold Levin and Dianne Nast, and Class Counsel Gene Locks and Steven Marks possess similar credentials." *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 373. Class Counsel's performance was praised by retired United States District Court Judge Layn R. Phillips, who mediated the negotiations of this Settlement. Mot. Prelim. Approval, Ex. D, ECF No. 6073-4. Plaintiffs' appellate counsel, Professor Samuel Issacharoff possesses similarly impressive credentials and showed great skill in shepherding the settlement through the Third Circuit appeal and petitions for certiorari in the United States Supreme Court.

No one has taken issue with the skill or efficiency of Class Counsel in securing this Settlement Agreement, nor could they. This factor weighs heavily in Class Counsel's favor.

iv. Complexity and duration of the litigation

For the fourth factor, I must consider the complex nature of this litigation and the duration of these proceedings. This Settlement was secured without formal discovery, with

limited litigation of motions, and with no bellwether trials. But, that does not mean the proceedings were simple.

This "case implicate[d] complex scientific and medical issues not yet comprehensively studied." *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 388. Mediator Judge Phillips, reported on the complexity of the multi-tracked mediation effort that was undertaken to obtain this Settlement. Mot. Prelim. Approval, Ex. D at 3. Class Counsel retained medical experts to advise "the parties on the multiplicity of medical definition issues and other medical aspects of the settlement." *Id.* at 4. Economists and actuaries were also retained to assist "in modeling the likely disease incidence and adequacy of the funding provisions and benefit levels contained in the proposed settlement." *Id.* Though motions practice was limited, Class Counsel was well-informed of the legal hurdles that would be faced if settlement was not reached, including preemption defenses, issues in proving causation, and statute of limitations defenses, to name only a few. *Id.* at 5-7. Class Counsel's deep knowledge of the strengths and weaknesses of the case allowed for intense and very productive negotiations.

Class Counsel mastered the intricacies of this case, creating matrices that maximized Class Member similarities and minimized differences. This allowed for the formation of the Class despite player differences, and it allowed for the relatively quick resolution of this complicated case so that impaired Class Members could receive compensation and access to treatment as quickly as possible. I agree with Class Counsel that this was a "high-risk, long-odds litigation." Fee Petition Mem. 1.

The duration of this case, from filing to the effective date, was about five years. During that time Class Counsel billed more than 50,000 hours. Additionally, Class Counsel will continue

to bill hours as the Settlement is implemented over the next 65 years. This factor weighs in Class Counsel's favor.

v. Risk of nonpayment

The fifth factor is an assessment of the financial health of the defendant and the likelihood that it will be able to satisfy a successful judgment against it. *Rite Aid*, 396 F.3d at 304. The financial solvency of the NFL was not an obstacle in this litigation.

vi. Amount of time devoted to the case by plaintiffs' counsel

In evaluating the sixth factor, I consider the time that Class Counsel has devoted to the case. A review of summaries submitted by the attorneys is sufficient for purposes of this factor. *Accord Rite Aid*, 396 F.3d at 307-08 (endorsing summaries of hours worked for lodestar calculation). Class Counsel has submitted summaries detailing the litigation that required more than 50,000 hours of work.

The litigation in this case would not have reached a settlement within such a short period of time if it were not for the intensive preparation by Class Counsel prior to and during negotiations. As Class Counsel explained, "[t]hose efforts included researching Plaintiffs' claims, developing information about the Class, contesting the NFL Parties' threshold preemption motions, consulting with numerous experts (including medical, economic, and actuarial), exchanging reams of information with the NFL Parties, extensive and spirited mediation, and defending the Settlement at three judicial levels . . . ." Fee Petition Mem. 43 (footnote omitted). Lastly, to reiterate, Class Counsel will remain involved in this case for the entire 65-year term of the Agreement. The time spent in this matter has been extensive and will continue. This factor favors approval of the fee application.

vii. Awards in similar cases

Next, I will compare the award requested in this case with awards in similar actions. *Rite Aid*, 386 F.3d at 303-04. An award of $106,817,220.62 for securing the Settlement Agreement constitutes approximately 11% of the estimated present value of the overall fund ($982.2 million). *See* Expert Reply 2-3. Class Counsel has provided extensive citation to cases both in and outside this district that present similar percentage rates for comparison. *See* Fee Petition Mem. 44-45. Additionally, Class Counsel has provided a study by Professor Brian T. Fitzpatrick, which notes that the average fee award for class settlements is 13.7% nationwide with a median of 9.5%. *Id.* at 47.[6] The 11% award here compares favorably to similar cases, thus this factor favors approval.[7]

viii. Value of benefits attributable to the efforts of Class Counsel relative to the efforts of other groups, such as government agencies conducting investigations

This was not a case "where government prosecutions [laid] the groundwork for private litigation." *In re Diet Drugs*, 582 F.3d 524, 544 (3d Cir. 2009) (citation omitted). This case required a pioneering effort by Class Counsel.

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[6] One objector urges a narrower review of the cases, suggesting that I compare the fees in this case specifically with the fees in the *Avandia* and *Diet Drugs* cases. Cobb Obj. Mem. 4-6, ECF No. 7401 (citing *In re Avandia Marketing, Sales Practices & Prods. Liab. Litig.*, No. 07-MD-01871 2012, WL 6923367 (E.D. Pa. Oct. 19, 2012); *In re Diet Drugs Prods. Liab. Litig.*, 553 F. Supp. 2d 442 (E.D. Pa. 2008)). I have considered each of those cases and conclude that the fee request here compares favorably. I also believe that a broader view of the cases is a better measure of the fee award than simply comparing the percentage-of-recovery.

[7] Some objectors suggest this is a "mega-fund" case, requiring generally lower fee percentages than present here. Class Counsel argues that this case should not be classified as a "mega-fund." Ultimately, I do not believe that the classification has any significant impact on the evaluation here. Whether this is a "mega-fund" or not, I am obligated to simply apply the "fact-intensive *Prudential/Gunter* analysis." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 331 n.4 (3d Cir. 2011) (quoting *Rite Aid*, 396 F.3d at 303). I have done so.

In fact, Class Counsel was actually fighting *against* prior cases in which the NFL Parties had successfully utilized defenses to obtain pretrial dismissals. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 391-92. This litigation required Class Counsel to reinvent the Plaintiff's position by conducting new research, developing experts, and briefing issues without the benefit of previous successful lawsuits.

Some objectors note that certain congressional hearings aided Class Counsel. While those proceedings undoubtedly provided some of the foundation for this litigation, the impact was limited. Overall, this factor strongly supports granting the requested fee.

ix. Percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained

Assessment of fees for Class Counsel and individually retained plaintiffs' attorneys ("IRPAs") in an MDL/class action is a complicated matter. I have taken great care to compartmentalize the fees sought by Class Counsel for the work done to advance the interests of the Class and the work done by IRPAs to advance the interests of their individual clients. As is discussed in the IRPA fee cap opinion also issued today, the market rates for counsel are important for purposes of that analysis. As is also discussed in that opinion, I have considered the overall fees that are properly paid to *all* attorneys involved in this litigation. I have determined that a 33% overall contingent fee rate for both Class Counsel and IRPAs combined is reasonable. To achieve the 33% overall rate, I presumptively capped IRPA fees at 22%. In light of that determination, Class Counsel's 11% award is reasonable under this factor.

x. Any innovative terms of settlement

Perhaps the strongest factor weighing in favor of the acceptance of Class Counsel's fee request is the final factor that takes into account the innovative terms of this Settlement Agreement. These terms have been noted throughout this analysis, but they bear repeating.

The 65-year Settlement Agreement in this case is uncapped, ensuring that funding will always be available for Class Members to receive Monetary Awards. It provides a complex matrix for determining Monetary Award amounts. Through this design, the Settlement Agreement ensures that Class Members' common exposure to the risks of concussive hits predominates, while simultaneously addressing any specific differences in impairments. The Agreement also accounts for the NFL Parties' causation concerns by reducing Awards based on a player's age at the time of diagnosis and the number of years played in the NFL.

Recognizing that CTE is an impairment that could not be diagnosed in a living player, the Settlement creatively implements a system to compensate cognitive symptoms associated with CTE instead. CTE "inflicts symptoms compensated by Levels 1.5 and 2 Neurocognitive Impairment and is strongly associated with the other Qualifying Diagnoses in the Settlement." *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 400.

Without these innovative terms, a settlement might not have been possible under current Supreme Court precedent. This factor weighs heavily in Class Counsel's favor.

xi. Conclusion

After looking at all of the *Prudential/Gunter* factors, it is clear that under a percentage-of-recovery analysis the 11% award of $106,817,220.62 million is reasonable.

2. Lodestar Crosscheck

Once the percentage-of-recovery factors are considered, a lodestar cross-check is used to check the valuation. "The lodestar award is calculated by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate . . . ." *Rite Aid,* 396 F.3d at 305. "The lodestar crosscheck 'is performed by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier.'" *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 330 n.61 (3d Cir. 2011) (quoting *In re AT & T Corp.,* 455 F.3d 160, 164 (3d Cir.

2006)). "The multiplier endeavors 'to account for the contingent nature or risk involved in a particular case,' and may be adjusted 'to account for particular circumstances, such as the quality of representation, the benefit obtained for the class, [and] the complexity and novelty of the issues presented.'" *Id.* (quoting *AT & T Corp,* 455 F.3d at 164 n.4). Since the lodestar cross-check is "not a full-blown lodestar inquiry," the evaluation can be based on summaries and less precise formulations. *Rite Aid*, 396 F.3d at 307 n.16 (quoting *Report of Third Circuit Task Force, Selection of Class Counsel*, 208 F.R.D. 340, 423 (2002)).

In the fee petition, Class Counsel has requested payment for 51,068 hours. Class Counsel's submission provided documentation for more than twenty firms that worked on this case. Upon my request, Class Counsel has submitted copies of time records from these firms for *in camera* review. Additionally, Class Counsel has submitted 6,830 hours for implementation through September 2017. Thus, the combined hours are 57,898. I determine that the hours submitted by Class Counsel are a fair and reasonable representation of the work performed.

Though the hours submitted are reasonable, the billing rates are not. Early in the litigation, Class Counsel reported that "[p]laintiffs have also reached consensus to establish reasonable uniform hourly rates for all partners, associates and paralegals conducting work that benefits all plaintiffs for purposes of reimbursement for fees from the Common Benefit Fund and for lodestar check against a fee and expense request from any class settlement." Joint Application 8, ECF No. 54. Despite this, the billing rates submitted by these law firms varied greatly. For example, billing rates submitted for partners ranged from $500 per hour to $1,350 per hour.

It is not reasonable that the partner rates submitted by some firms are more than twice the rates submitted by other firms.[8] To avoid this problem with the submitted rates, I will use a blended billing rate, which is endorsed by the Third Circuit. *See Rite Aid,* 396 F.3d at 306. To "blend" rates, a court can simply average the rates of all partners, associates, and paralegals. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2017 WL 3175924, at *4 (N.D. Cal. July 21, 2017). Here, blending the rates of all partners, associates, and paralegals produces an average rate of $623.05 per hour. Using this blended average, I have calculated that Class Counsel's combined lodestar is $36,073,348.90.

To calculate the multiplier, I must divide the fee award, $106,817,220.62, by the lodestar amount $36,073,348.90. This results in a lodestar multiplier of 2.96, well within the norm for this Circuit, which has noted that multipliers ranging from one to four are frequently awarded. *Prudential*, 148 F.3d at 341 (quoting 3 Herbert Newberg & Alba Conte, Newberg on Class Actions § 14.03 at 14-15 (3d ed. 1992)); *cf. Cendant*, 243 F.3d at 742 (observing a range of reasonable multipliers from 1.35 to 2.99). Considering the risk undertaken by Class Counsel and their extraordinary work in this litigation, I conclude that a multiplier of 2.96 provides strong additional support for approving the requested fee award.[9]

[8] Class Counsel provided extensive citation to other cases where billable rates were deemed "reasonable" by a court. In those examples, courts were presented with partner billing rates that varied by approximately $300, as opposed to the $850 divergence here.

[9] Significantly, even though this multiplier is reasonable, it is artificially high. The actual lodestar in this case will continue to increase as Class Counsel bills more hours for settlement implementation. It is likely that a portion of Class Counsel's fee request will be allocated to pay for this future work. Therefore, because the lodestar and lodestar multiplier have an inverse relationship, the multiplier will continue to *decrease* as Class Counsel continues to increase the lodestar by billing hours for implementation.

C. 5% Holdback Request

Class Counsel has requested that all future implementation work be paid through a holdback of 5% of all Monetary Awards. Based on the projected value of the Monetary Award Fund, this would provide an estimated $40 million to pay for additional costs and fees.[10] I appointed Professor William B. Rubenstein of Harvard Law School to advise the Court regarding Class Counsel's holdback request. Professor Rubenstein concluded that this Court should set aside $22.5 million from $112.5 million request to pay for Class Counsel's work to implement the Settlement Agreement and the remaining $90 million should be used to pay Class Counsel for their work in securing the Settlement Agreement. Expert Report 1, ECF No. 9526. Professor Rubenstein suggested that setting aside $22.5 million into an interest bearing account would enable Class Counsel to receive $1 million per year for implementation during the 65-year term of the Settlement. *Id.*[11]

The Court is troubled that the $1 million per year suggested by Professor Rubenstein may be insufficient to pay the costs and fees associated with future implementation of the Settlement. The past year of implementation alone has required Class Counsel to bill well over $5 million in costs and fees. *See* Decl. Chris Seeger 19, ECF No. 8447 (summarizing implementation costs and fees through September 2017). While the Court assumes that Class Counsel's implementation work will decrease as the Settlement progresses, no party or expert has provided the Court with an adequate estimate for the amount of work that will be required in the future.

[10] Class Counsel provided an updated analysis of the Settlement, which estimates the value of the Monetary Award Fund to be $1,297,0000,000, with a net present value of $785,000,000. Co-Lead Class Counsel Response to Expert Report 4. Five percent is, therefore, $39,250,000.

[11] As a last resort, Professor Rubenstein stated that the Court could consider a 2% holdback of Monetary Awards to help pay for implementation. Expert Reply 7-8.

Because of this current ambiguity and in an abundance of caution, the Court reserves decision on the 5% holdback request. The Court plans to adopt Professor Rubenstein's recommendation to set aside some portion of the $112.5 million for future implementation work, but the Court simply needs more time to evaluate the situation before making a final determination regarding the amount of a set aside from the $112.5 award and the amount, if any, of a percentage holdback of Monetary Awards. Reserving decision will allow for the accumulation of more data that can be used to more accurately assess future costs and fees. The issue will be revisited at a future point once a clearer picture has emerged. In the meantime, the Claims Administrator will continue to holdback 5% of each Monetary Award as a precautionary measure. The holdback comes directly from the Award if a Class Member is unrepresented by counsel, however, if the Class Member is represented by an IRPA, then the holdback comes from the IRPA's contingent fee.[12]

The Court recognizes the hardship that holding back funds may place on unrepresented Class Members and IRPAs, but the hardship is necessary to ensure the integrity and longevity of the Settlement. The Court hopes and anticipates that the combination of a set aside and a precautionary 5% holdback will provide more than enough money for implementation. If the 5% holdback is more than necessary, then any remaining portion of that amount will be returned to Class Members and IRPAs.

[12] In the opinion also released today regarding the IRPA fee cap, I set a presumptive cap of 22%. Therefore, with the 5% holdback, the cap is effectively 17% until this issue is resolved. As noted in that opinion, a 17% cap is still reasonable while keeping the presumptive overall contingent fee payment at 33%—the 5% holdback plus IRPAs' 17% contingent fee and Class Counsel's 11% award. For Class Members without IRPAs, their overall contingent fee payment at this point will be 16%—the 5% holdback plus Class Counsel's 11% award.

D. Incentive Awards for Class Representatives

As a final matter, Class Counsel seeks incentive awards of $100,000 for each of the Class Representatives in this case: Corey Swinson, Shawn Wooden, and Kevin Turner. There has not been any objection submitted regarding this request. Upon review, I approve the awards. *Accord Brady v. Air Line Pilots Ass'n*, 627 F. App'x 142, 146 (3d Cir. 2015) (approving a $640,000 incentive award as part of a $15.9 million attorneys' fee award).

As was explained by Class Counsel, the work performed by the Class Representatives in this litigation was important. Mr. Swinson was the original representative for Subclass 1, and Mr. Wooden took over that role after Mr. Swinson's passing. Class Counsel reports that both worked closely with Subclass 1 counsel, Arnold Levin, as the terms of the Settlement Agreement were negotiated. After final approval, Mr. Wooden remained actively involved, helping to provide information to other players and their families about the Settlement Agreement. Class Counsel reports that Mr. Turner provided similar support for Subclass 2 counsel, Dianne Nast. Mr. Turner passed away shortly before the Third Circuit affirmed the Settlement Agreement.

I believe that this work provided a great value to the Class. The contributions should be recognized through a payment to Mr. Wooden and payments to the estates of Mr. Turner and Mr. Swinson. Because there have been no objections raised to these disbursements and the Class Representatives' roles will not change going forward, I conclude that these amounts will be paid immediately and prior to allocation of the common benefit fund to Class Counsel.

III. Conclusion

For these reasons, I conclude that Co-lead Counsel's petition for award of attorneys' fees and reimbursement of expenses for Class Counsel will be granted.[13] The request for a 5%

[13] I have not addressed the allocation of this common benefit fund in this opinion. The allocation will be addressed in a separate opinion. At that time, I will review the proposed fee allocation

holdback of Monetary Awards remains pending.

s/Anita B. Brody

ANITA B. BRODY, J.

submitted by Co-Lead Class Counsel, the objections, and Co-Lead Class Counsel's reply. I will also review the fee petitions submitted (ECF Nos. 7070, 7116, 7230, and 8725) and the related responses.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	**Hon. Anita B. Brody**
THIS DOCUMENT RELATES TO: ALL ACTIONS	

ORDER

AND NOW, this 5th day of April, 2018, in accordance with the common benefit fund Memorandum issued on April 5, 2018, it is **ORDERED** that Class Counsel is awarded $106,817,220.62 in attorneys' fees and $5,682,779.38 in costs ($112.5 million total).

It is further **ORDERED** that Shawn Wooden, the estate of Corey Swinson, and the estate of Kevin Turner are each to be paid $100,000 from the common benefit fund as an incentive award for being Class Representatives.

s/Anita B. Brody

ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to:

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
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April 5, 2018 **Anita B. Brody, J.**

MEMORANDUM

Over the past year, the Court has focused on the implementation of the Settlement Agreement. Now that implementation is in progress, it is time to focus on attorneys' fees. There are four key issues for the Court to decide:

(1) the total amount for the common benefit fund;

(2) the allocation of the common benefit fund among Class Counsel;

(3) the amount, if any, to be set aside for attorneys' fees incurred in the implementation of this complex Settlement Agreement and the possible need for future attorneys' fees throughout the 65-year term of the Agreement; and

(4) the reasonableness of the amount of fees to be paid by individual Class Members from their Monetary Awards to individually retained plaintiffs' attorneys ("IRPAs").

This last issue impacts on the Monetary Awards to be distributed to individual Class Members and will be addressed below.[1]

On September 14, 2017, I appointed Professor William B. Rubenstein of Harvard Law School as an expert witness on attorneys' fees, covering the issues of (1) fees to be paid to individually retained plaintiffs' attorneys ("IRPAs") and (2) Class Counsel's 5% holdback request. Professor Rubenstein then issued an Expert Report covering those topics. Interested parties were given the opportunity to respond to the Expert Report. Professor Rubenstein then filed a reply to the interested parties' responses to the Expert Report. Lastly, several interested parties filed sur-replies to Professor Rubenstein's reply.

For the reasons set forth below, after considering the recommendations of Professor Rubenstein and the viewpoints of interested parties, I adopt the conclusions of Professor Rubenstein and order that IRPAs' fees be capped at 22% plus reasonable costs. I further adopt Professor Rubenstein's suggestion that IRPAs and Class Members be allowed to file petitions seeking upward or downward deviations from this fee cap. Such deviations, however, will only be granted in exceptional or unique circumstances.

I. BACKGROUND

In his Expert Report, Professor Rubenstein provided extensive background on IRPAs' involvement in this litigation. Expert Report 2-12, ECF No. 9526. Most importantly, Professor Rubenstein explained the special circumstances related to IRPAs in this case:

> While Class Counsel represent the interests of all class members in the aggregate, many individual class members also have their own lawyers. This MDL encompassed thousands of individual lawsuits filed by hundreds of players who were represented individually (or in groups) by their own lawyers. Moreover, other players (or their families) retained individual counsel to represent them in

[1] Because the amount of fees to be paid to Class Counsel impacts the calculation of the fee cap addressed in this opinion, the common benefit fund opinion has also been filed today.

> the course of the class action proceedings. The class action settlement foreclosed all individual cases, except for those pursued by players who opted out of the settlement, and the class action notice advised players that, "You do not have to hire your own attorney." Nonetheless, about half (47% or 9,477 out of 20,376) of the parties that have registered for payment through the class action settlement are represented by their own attorneys.

Id. at 7-8 (footnotes omitted).

II. DISCUSSION

A. The Authority to Impose a Fee Cap

I adopt Professor Rubenstein's conclusion that a court has the authority to impose a fee cap derived from both the power of a court presiding over an MDL or class action and the ability of a court to review individual fee awards. *Id.* at 12-19.

In MDLs and class actions, "district courts have routinely capped attorneys' fees *sua sponte*." *In re World Trade Center Disaster Site Litig.*, 754 F.3d 114, 126 (2d Cir. 2014); *see also In re: Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mexico, on Apr. 20, 2010*, No. 10-md-2179 (E.D. La. June 15, 2012) (order setting caps on individual attorneys' fees), ECF No. 6684 at 2; *In re Vioxx Prod. Liab. Litig.*, 650 F. Supp. 2d 549, 553-54, 558-59 (E.D. La. 2009). In complex mass litigation, "excessive fees can create a sense of overcompensation and reflect poorly on the court and its bar," negatively impacting "[p]ublic understanding of the fairness of the judicial process." *In re Zyprexa Prod. Liab. Litig.*, 424 F. Supp. 2d 488, 493-94 (E.D.N.Y. 2006). Consequently, courts must curb such excessive or unreasonable fees to safeguard the public's perception of the courts and the legitimacy of the legal system's handling of massive MDLs and class actions. The way to curb such fees is with a cap.

District courts also derive authority to cap fees from their power to review an individual attorney's fee agreement. "Third Circuit law unequivocally supports the proposition that this Court possesses the inherent authority to regulate the contingent fees of lawyers appearing before

it and any lawyer representing a class member in this Settlement is clearly subject to this authority." Expert Report 19; *see also McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 100 (3d Cir. 1985) [*McKenzie I*] ("[I]n a civil action, a fee may be found to be 'unreasonable' and therefore subject to appropriate reduction by a court . . . ."); *Dunn v. H. K. Porter Co.*, 602 F.2d 1105, 1110 (3d Cir. 1979) ("[W]here there is a fee contract, courts have the general power to override it, and set the amount of the fee." (internal quotation marks omitted)).

B. The Need for a Fee Cap

I agree with Professor Rubenstein that the circumstances of this litigation require the implementation of a cap. I adopt Professor Rubenstein's conclusion that a fee cap is necessary in this case, because:

> (1) *players with IRPAs are paying two [sets of] lawyers' fees* (2) in a case settled on an aggregate basis (3) following relatively little litigation (4) requiring IRPAs to undertake a modest amount of work . . . for [5] vulnerable clients [6] who may be subject to contingent fees contracts that were either problematic at formation or are no longer reasonable.

Expert Report 26 (emphasis added). The reality is that two sets of attorneys—IRPAs and Class Counsel—have worked to achieve results for individual Class Members. Although some of the work of IRPAs may be considered separate and distinct from the work of Class Counsel, it is undeniable that all IRPAs have benefitted from Class Counsel's work. An assessment of the reasonableness of IRPAs' fees requires a deduction for Class Counsel's work, which reduced the amount of work required of IRPAs. *See Walitalo v. Iacocca*, 968 F.2d 741, 749 (8th Cir. 1992) (acknowledging that class counsel reduced the amount of work required of individual counsel and directing "the district court to review the plaintiffs' fee arrangements with their individual counsel for reasonableness in light of their decreased responsibilities and the fee award to [class] counsel"). This reduction is necessary to prevent a "free-rider problem"—enabling IRPAs to

financially benefit from the work of Class Counsel even though they did not bear the costs. *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606 (1st Cir. 1992); *cf. In re Vioxx*, 760 F. Supp. 2d at 653 ("[A]s between a common benefit attorney who expended considerable time, resources, and took significant economic risks to produce the fee, and the primary attorney who did not, it is appropriate and equitable that the former receive some economic recognition from the [latter].") Additionally, it is necessary to reduce IRPAs' contingent fees to avoid the problem of Class Members paying twice for the same work—once to Class Counsel and then again to IRPAs.[2]

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[2] Many of the interested parties contend that Class Counsel's fee has no bearing on Class Members' recoveries because the Settlement is uncapped. Thus, they argue that Class Counsel's fee should not be calculated in the total amount of attorneys' fees attributable to each Class Member. I join Professor Rubenstein in rejecting this argument:

> A simple analogy helps demonstrate why I continue to believe that Class Counsel's contingent fees must be counted as part of the class's recovery regardless of how the settlement is structured. Assume a client hired a lawyer to pursue a tort claim on a one-third contingent fee basis. After some litigation, the lawyer calls the client and says, "Good news, the defendant has agreed to settle the case and you will be getting $1.1 million. Better yet," she continues, "After we settled your case, we negotiated my fee and the defendant separately agreed to pay me $700,000 directly, with not a penny of that coming out of your $1.1 million." At that point, the client might think, "Wait a minute. It appears we are getting $1.8 million in total and my 2/3 share should be $1.2 million and your 1/3 share $600,000, per our retainer agreement." And of course the client would be right. The point of the analogy is not to suggest malfeasance by Class Counsel in this case; the analogy simply drives home the point that, in assessing the reasonableness of the fees being paid by individual class members, Class Counsel's fees must be considered a component of the class's relief. The facts that the parties have set class members' individual recovery levels net of those fees, that the fees were (partially) negotiated separately from the class's recovery, and/or that the NFL has agreed to pay all claims made in the settlement, in no way alter the point, nor are the parties' efforts to distinguish the key Third Circuit precedents convincing.

Expert Reply 3 n.8, ECF No. 9571. Moreover, although the Settlement Agreement is uncapped, the amount of each individual Class Member's Monetary Award is limited by

I further adopt Professor Rubenstein's conclusion that "a one-third contingent fee best approximate[s] the risk and work that the two sets of attorneys (Class Counsel and IRPAs) undertook in this case."[3] Expert Reply 3, ECF No. 9571. Because I conclude that an overall contingent fee of 33% is appropriate, and I have concluded in a separate opinion issued today that the fee to be paid to Class Counsel will constitute approximately 11% of the Class's recovery,[4] the fees to be paid to IRPAs will be presumptively capped at 22%. To ensure that a 22% cap is fair to all parties involved, I must now crosscheck that number with an assessment of the relevant Third Circuit factors, data on contingent fee levels in this case, and data from other cases.

In assessing the reasonableness of contingent fees, the Third Circuit directs courts to consider the "circumstances existing at the time the arrangement is entered into, . . . the quality of the work performed, the results obtained, and whether the attorney's efforts substantially contributed to the result." *McKenzie Constr., Inc. v. Maynard*, 823 F.2d 43, 45 (3d Cir. 1987)

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the terms of the Settlement Agreement. Thus, Class Counsel's fee may have impacted the formula for each individual Monetary Award and must be considered a component of Class Members' relief.

[3] Some interested parties contend that the fee cap selected is arbitrary. I adopt Professor Rubenstein's recommendation that an overall fee of 33% is appropriate given the nature of the litigation in this case. This case settled early in the litigation. As Professor Rubenstein noted:

> Class Counsel settled the entire case after briefing one dispositive motion, without undertaking any formal discovery, without significant motion practice, without summary judgment briefings, and without preparing for, much less engaging in, a class (or even one bellwether) trial; no IRPA will need to undertake these tasks either. One of the firms designated as Class Counsel itself states that "[t]his is the only mega fund case in which there was no paper discovery, no depositions, no motion practice, no litigation, no trials, no trial activity."

Expert Report 22 (footnote omitted) (internal quotation marks omitted). Given that, on average, other similar cases capped overall fees at 32.25%, the decision to use 33% is well-founded. *See, e.g.*, *In re Vioxx*, 650 F. Supp. 2d 549 (implementing a cap of 32% on overall fees in a case settled following six bellwether trials).

[4] The 11% figure is derived from the overall attorneys' fee award ($106,817,220.62) divided by the overall estimated present value of the Settlement ($982,200,000).

[*McKenzie II*]. Importantly, a court must consider whether subsequent events have rendered an agreement—that may have been fair at the time of contracting—unfair at the time of enforcement. *Id.*

I adopt Professor Rubenstein's conclusion that "application of the Third Circuit's reasonableness factors argues in favor of a substantially reduced contingent fee" for IRPAs. Expert Report 28. The risks of this litigation changed dramatically throughout the various phases of litigation that were noted by Professor Rubenstein. I adopt the conclusion that "contingent fee contracts for large percentages entered into earlier in this case's history are no longer reasonable under the case's present circumstances." *Id.* at 27.

I must also consider "the quality of the work performed, the results obtained, and whether the attorney's efforts substantially contributed to the result." *McKenzie II*, 823 F.2d at 45. The work of Class Counsel substantially contributed to the aggregate resolution of this case. The IRPAs' work here involves the shepherding of their clients through the claims process of the Settlement Agreement. "An IRPA should be able to serve her client to this level without need of 30-40% of that award." Expert Report 28. Therefore, the presumptive cap of 22% is reasonable, and any exceptional or unique circumstances will be accounted for on an individualized basis.

Data on the contingent fees set by IRPAs at various points during this litigation also support a reasonable cap of 22%. Professor Rubenstein evaluated 640 IRPA contracts in this case and found that the contingent fee rates "range from a low of 15% to a high of 40%, with a median of 30% and a mean of 29%." *Id.* As the risk involved in the litigation decreased, the contracted-for rates also decreased. *Id.* at 28-29. These later contingent fee rates range between 20-25%. *Id.* at 29. Thus, the market rate for IRPAs in this case indicates that a 22% fee cap is reasonable under the current circumstances.

Comparison to fee caps in other cases confirms that a 22% fee cap here is reasonable. As Professor Rubenstein noted:

> Courts in cases with similar settlement structures – *i.e.*, cases involving both central aggregate lawyers and IRPAs – have capped contingent fees in the past. In six such cases, courts set total fee caps (for both the aggregate lawyers and IRPAs) ranging from 20% to 37.18%, with an average of 32.25%; these six data points yielded effective IRPA fees ranging from 18% to 33.5%, with an average of 23.69%. In another set of seven cases, courts more directly capped IRPA rates, with those caps ranging from 5% to 33.33%, with an average of 17.95%. The average IRPA cap across all 13 cases is 20.6%. An eighth court simply awarded IRPAs a flat fee cap of $10,000 for processing claims through the class action settlement.

Id. at 30.

In light of these considerations, including the amount of attorneys' fees charged by both Class Counsel and IRPAs, I conclude that a fee cap of 22% for IRPAs is reasonable.[5]

C. Petitions to Deviate from the Fee Cap

I adopt Professor Rubenstein's conclusion that counsel and their clients should be given the opportunity to petition the Court to deviate from this cap in exceptional or unique circumstances.[6] I further adopt Professor Rubenstein's non-exhaustive list of circumstances that might provide a party a basis to deviate from this presumptive fee. *See id.* at 32-33. As in all

[5] As noted in the common benefit fund opinion also issued today, the Court is reserving judgment on Class Counsel's request for a 5% holdback of all Monetary Awards as a precaution to ensure sufficient funds to pay for implementation of the Settlement. Currently, the Claims Administrator is withholding that 5% from the fee of each IRPA. Therefore, while the Court's determination remains pending, this practice will continue. The precautionary 5% withholding effectively lowers the IRPA fee cap to 17% until further notice. The Court hopes that the 5% holdback will not be necessary for implementation. However, even if the effective 17% cap is final, the Court notes that it would also be reasonable based on Professor Rubenstein's calculation that the average direct fee cap for IRPAs is 17.95%, *see* Expert Report 30, and his initial recommendation and support for a 15% fee cap, *see id.* at 1.

[6] Certain interested parties contend that the fee cap violates their procedural due process rights. Prior to my decision to institute a fee cap, however, IRPAs were given an opportunity to respond to Professor Rubenstein's recommendations for a fee cap contained in both his initial Expert Report and his Expert Reply. Additionally, they still have the opportunity to petition the Court to deviate from the cap in exceptional or unique circumstances.

cases relating to contingent fee agreements, attorneys are required to demonstrate by a preponderance of the evidence that the fee requested is reasonable. *Id.* at 33; *see also McKenzie I*, 758 F.2d at 100. These petitions will be referred to the Honorable David R. Strawbridge, United States Magistrate Judge for the Eastern District of Pennsylvania,[7] for review in accordance with 28 U.S.C. § 636.

V. CONCLUSION

For the reasons set forth above, fees to IRPAs will be capped at 22% plus reasonable costs unless the terms of a contingent fee contract reflect a rate lower than the 22% fee cap, in which case the lower fee will apply. In exceptional or unique circumstances, the Court will entertain petitions seeking an upward or downward deviation from the presumptive fee cap.

s/Anita B. Brody

ANITA B. BRODY, J.

[7] If necessary, these petitions may be referred to another United States Magistrate Judge for the Eastern District of Pennsylvania.

Copies **VIA ECF** on _____ to:

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	**Hon. Anita B. Brody**
THIS DOCUMENT RELATES TO: ALL ACTIONS	

ORDER

AND NOW, this _5th__ day of April, 2018, in accordance with the fee cap Memorandum issued on April 5, 2018, it is **ORDERED** that fees to IRPAs are capped at 22% plus reasonable costs unless the terms of a contingent fee contract reflect a rate lower than the 22% fee cap, in which case the lower fee will apply. In exceptional or unique circumstances, the Court will entertain petitions seeking an upward or downward deviation from the presumptive fee cap.

It is further **ORDERED** that, pursuant to 28 U.S.C. § 636, all petitions seeking an upward or downward deviation from the presumptive fee cap are **REFERRED** to the Honorable David R. Strawbridge, United States Magistrate Judge for the Eastern District of Pennsylvania.

Judge Strawbridge is authorized to promulgate the rules and procedures governing IRPAs' contingent fees.

s/ Anita B. Brody

ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to:

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: ALL ACTIONS	**Hon. Anita B. Brody**

ORDER

AND NOW, this 23rd day of August, 2017, pursuant to Federal Rule of Evidence 706, it is **ORDERED** that:

- On or before **August 31, 2017**, any interested party must show cause why the Court should not appoint an expert witness on attorneys' fees;
- On or before **August 31, 2017**, any interested party must show cause why, having obtained his consent to serve as an expert witness in this matter, the Court should not appoint Professor William B. Rubenstein (CV attached) to serve as an expert witness on attorneys' fees.

Anita B. Brody
ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to:

Copies **MAILED** on _____ to:

PROFESSOR WILLIAM B. RUBENSTEIN

Harvard Law School - AR323
1545 Massachusetts Avenue
Cambridge, MA 02138

(617) 496-7320
rubenstein@law.harvard.edu

ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Sidley Austin Professor of Law	2011-present
Professor of Law	2007-2011
Bruce Bromley Visiting Professor of Law	2006-2007
Visiting Professor of Law	2003-2004, 2005-2006
Lecturer in Law	1990-1996

Courses: Civil Procedure; Class Action Law; Remedies
Awards: 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence
Membership: American Law Institute; American Bar Foundation Fellow

UCLA SCHOOL OF LAW, LOS ANGELES CA

Professor of Law	2002-2007
Acting Professor of Law	1997-2002

Courses: Civil Procedure; Complex Litigation; Remedies
Awards: 2002 Rutter Award for Excellence in Teaching
Top 20 California Lawyers Under 40, *Calif. Law Business* (2000)

STANFORD LAW SCHOOL, STANFORD CA

Acting Associate Professor of Law	1995-1997

Courses: Civil Procedure; Federal Litigation
Awards: 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

Lecturer in Law	1994, 1995

BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

Visiting Professor	Summer 2005

LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel	1987-1995

Litigated impact cases in federal and state courts throughout the US. Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country, and coordinated work with private cooperating counsel nationwide. Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

Law Clerk	1986-87

PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern	Summer 1985

EDUCATION

HARVARD LAW SCHOOL, CAMBRIDGE MA
J.D., 1986, *magna cum laude*

YALE COLLEGE, NEW HAVEN CT
B.A., 1982, *magna cum laude*
Editor-in-Chief, YALE DAILY NEWS

SELECTED COMPLEX LITIGATION EXPERIENCE

Professional Service and Highlighted Activities

◊ *Author,* NEWBERG ON CLASS ACTIONS (sole author of Fourth Edition updates since 2008 and sole author of all content in the Fifth Edition)

◊ *Speaker,* Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (invited to present to MDL judges on recent developments in class action law and related topics (2010, 2011, 2012, 2013, 2014 (invited), 2015, 2016, 2017)

◊ *Special counsel,* Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom., Berman DeValerio v. Olinsky*, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

◊ *Author, Amicus* brief filed in the United States Supreme Court on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

◊ *Amicus curiae, Amicus* brief filed in – and approvingly cited by – California Supreme Court on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc.*, 376 P.3d 672, 687 (Cal. 2016))

◊ *Adviser,* American Law Institute, *Project on the Principles of the Law of Aggregate Litigation,* Philadelphia, Pennsylvania

◊ *Advisory Board, Class Action Law Monitor* (Strafford Publications), 2008-

◊ *Co-Chair,* ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007

◊ *Planning Committee,* American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007

◊ "*Expert's Corner*" (Monthly Column), *Class Action Attorney Fee Digest,* 2007-2011

Expert Witness

- ◊ Retained as an expert witness and submitted report explaining meaning of the denial of a motion to dismiss in American procedure to foreign tribunals (*In re Qualcomm Antitrust Matter,* declaration submitted to tribunals in Korea and Taiwan (2017))

- ◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 3.0-liter settlement, referenced by court in awarding fees (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 3175924 (N.D. Cal. July 21, 2017))

- ◊ Retained as an expert witness concerning impracticability of joinder in antitrust class action (*In re Celebrex (Celecoxib) Antitrust Litigation,* Civ. Action No. 2-14-cv-00361 (E.D. Va. (2017))

- ◊ Submitted an expert witness declaration and deposed concerning impracticability of joinder in antitrust class action (*In re Modafinil Antitrust Litigation,* Civ. Action No. 2-06-cv-01797 (E.D. Pa. (2017))

- ◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 2.0-liter settlement (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 1047834 (N.D. Cal., March 17, 2017))

- ◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Aranda v. Caribbean Cruise Line, Inc.,* 2017 WL 1368741 (N.D. Ill., April 10, 2017))

- ◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*McKinney v. United States Postal Service*, Civil Action No. 1:11-cv-00631 (D.D.C. (2016))

- ◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

- ◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

- ◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Geancopoulos v. Philip Morris USA Inc.*, Civil Action No. 98-6002-BLS1 (Mass. Superior Court, Suffolk County))

- ◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

- ◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company,* Case No. 11 Civ. 3487 (S.D.N.Y. 2015))

- ◊ Retained as an expert trial witness on class action procedures and deposed prior to trial in matter

that settled before trial (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))

◊ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.,* Case No. 1:09-cv-00554 (D.R.I. (2015))

◊ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees, and incentive awards (*Fitzgerald Farms, LLC v. Chespeake Operating, L.L.C.,* Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Asghari v. Volkswagen Grp. of Am., Inc.*, 2015 WL 12732462 (C.D. Cal. May 29, 2015))

◊ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation,* 08-CV-4772-LTS-DCF (S.D.N.Y. (2015))

◊ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation,* MDL 13-02424 (C.D. Cal. (2014))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory,* Case No. RG0522096, California Superior Court, Alameda County (2014))

◊ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.*, Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))

◊ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC,* Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))

◊ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation,* Civil Action No. 04-10981, MDL 1629 (D. Mass. (2014))

◊ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel,

referenced by court in deciding issue (*White v. Experian Information Solutions, Inc.*, 993 F. Supp. 2d 1154 (C.D. Cal. (2014))

◊ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.*, Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))

◊ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems,* Case No. BC448383, California Superior Court, Los Angeles County (2013))

◊ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (*Herke v. Merck,* No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*) (E. D. La. (2013))

◊ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (*Henderson v. Acxiom Risk Mitigation, Inc.,* Case No. 3:12-cv-00589-REP (E.D. Va. (2013))

◊ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of "net expected value" of settlement benefits, relied on by court in approving settlement (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))

◊ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013))

◊ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC,* Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))

◊ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))

◊ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action, relied upon by the court in affirming class certification order (*CVS Caremark Corp. v. Lauriello,* 175 So. 3d 596, 609-10 (Ala. 2014))

◊ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung,* Case No. BC 460783, California Superior Court, Los Angeles County (2012))

◊ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (*KB Home v. K&L Gates, LLP,* Case No. BC484090, California Superior Court, Los Angeles County (2011))

- ◊ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.,* Case No. CIV-2008-1008-W (W.D. Ok. (2011))

- ◊ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill,*Case No. 3:10-CV-02269-O-BK (N.D. Tex. (2011))

- ◊ Retained as an expert witness in fee-related dispute (*Furth v. Furth*, Case No. C11-00071-DMR (N.D. Cal. (2011))

- ◊ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation,* Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))

- ◊ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La. (2010))

- ◊ Submitted expert witness declaration concerning fee application in securities case, referenced by court in awarding fee (*In re AMICAS, Inc. Shareholder Litigation,* 27 Mass. L. Rptr. 568 (Mass. Sup. Ct. (2010))

- ◊ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement, relied upon by the court in awarding fees (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172-74 (C.D. Cal. 2010))

- ◊ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

- ◊ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

- ◊ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.,* Case No. CV-05-3222 (C.D. Cal. (2010))

- ◊ Submitted an expert witness declaration concerning fairness of settlement provisions and processes, relied upon by the Ninth Circuit in reversing district court's approval of class action settlement (*Radcliffe v. Experian Inform. Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))

- ◊ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute, relied upon by the court in deciding fee issue (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 871, 160 Cal. Rptr. 3d 557, 573 (2d Dist. 2013))

- ◊ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811 (E.D. Mo. (2009))

◊ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No.1735 (D. Nev. (2009))

◊ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding, referenced by court in awarding fees (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F. Supp.2d 58 (D.D.C. (2009))

◊ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842 (D. R.I. (2009))

◊ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))

◊ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869 (D. D.C. (2008))

◊ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))

◊ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif*, Case No. KC034700, California Superior Court, Los Angeles County (2008))

◊ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB (E.D. Ky. (2008))

◊ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.*, JAMS Arbitration No. 1220026252 (2007))

◊ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.*, Civil Action No. 06-11033 PBS (D. Mass. (2007))

◊ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al.*, No. 07-39 (E. D. Ky. (2007))

◊ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.*, No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))

◊ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))

◊ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))

◊ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL (C.D. Cal. (2006))

◊ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))

◊ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.*, Missouri Circuit Court, St. Louis, MO (2005))

◊ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))

◊ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City,* Case No. Civ. 2001-1827-C (W.D. Ok. (2002))

◊ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2001))

Expert Consultant

◊ Provided expert consulting services to the ACLU on multi-district litigation issues arising out of various challenges to President Trump's travel ban and related policies (*In re American Civil Liberties Union Freedom of Information Act Requests Regarding Executive Order 13769*, Case Pending No. 28, Judicial Panel on Multidistrict Litigation (2017); *Darweesh v. Trump*, Case No. 1:17-cv-00480-CBA-LB (E.D.N.Y. (2017))

◊ Provided expert consulting services to law firm regarding billing practices and fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to law firm regarding fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to the ACLU of Southern California on class action and procedural issues arising out of challenges to municipality's treatment of homeless persons with disabilities (*Glover v. City of Laguna Beach*, Case No. 8:15-cv-01332-AG-DFM (C.D. Cal. (2016))

◊ Retained as an expert consultant on class certification issues (*In re: Facebook, Inc., IPO Securities and Derivative Litigation*, No. 1:12-md-2389 (S.D.N.Y. 2015))

◊ Provided expert consulting services to lead class counsel on class certification issues in nationwide class action (2015)

◊ Retained by a Fortune 100 Company as an expert consultant on class certification issues

◊ Retained as an expert consultant on class action and procedure related issues (*Lange et al v. WPX Energy Rocky Mountain LLC*, Case No. #: 2:13-cv-00074-ABJ (D. Wy. (2013))

◊ Retained as an expert consultant on class action and procedure related issues (*Flo & Eddie, Inc., v. Sirius XM Radio, Inc.*, Case No. CV 13-5693 (C.D. Cal. (2013))

◊ Served as an expert consultant on substantive and procedural issues in challenge to legality of credit card late and over-time fees (*In Re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014))

◊ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*,No. 2:13-cv-00192-JAK-MRW (C. D. Cal. (2013))

◊ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La. (2012))

◊ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation*, MDL No. 2323, Case No. 2:12-md-02323-AB (E.D. Pa. (2012))

◊ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action (*In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102 (S.D. N.Y. (2009))

◊ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733 (S.D. Iowa (2008))

◊ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 (C.D. Cal.

(2008))

◊ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.*, Civil No. 8-04194 (E.D. Pa. (2008))

◊ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit (2008))

◊ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))

◊ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))

◊ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))

◊ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari*, Supreme Court of California (2006))

◊ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re DietDrugs (Phen/Fen) Products Liability Litigation* (E. D. Pa. (2006))

◊ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))

◊ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, (C.D. Cal. 2004))

◊ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)

◊ Served as an exert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, 199 F.3d 1331 (9th Cir. 1999))

Ethics Opinions

◊ Retained to provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2017))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2013))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re*

Professional Responsibility Inquiries (2011))

◊ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))

◊ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

Publications on Class Actions & Procedure

◊ NEWBERG ON CLASS ACTIONS (sole author of supplements to 4th edition since 2008 and of 5th edition (2011-2017))

◊ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)

◊ *Procedure and Society: An Essay for Steve Yeazell,* 61 U.C.L.A. REV. DISC. 136 (2013)

◊ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)

◊ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)

◊ *Class Action Fee Award* Procedures, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)

◊ *Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)

◊ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)

◊ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)

◊ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases –At Least In Principle,* 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)

◊ *The Puzzling Persistence of the "Mega-Fund" Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)

◊ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)

◊ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

- ◊ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)
- ◊ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)
- ◊ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)
- ◊ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)
- ◊ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)
- ◊ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)
- ◊ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)
- ◊ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)
- ◊ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)
- ◊ *Supreme Court Round-Up*, 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)
- ◊ *Fee-Shifting For Wrongful Removals: A Developing Trend?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)
- ◊ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel*, 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)
- ◊ *Why The Percentage Method?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)
- ◊ *Reasonable Rates: Time To Reload The (*Laffey*) Matrix*, 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)
- ◊ *The "Lodestar Percentage:" A New Concept For Fee Decisions?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)
- ◊ *Class Action Practice Today: An Overview, in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)
- ◊ *Shedding Light on Outcomes in Class Actions, in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)

◊ *Finality in Class Action Litigation: Lessons From Habeas,* 82 N.Y.U. L. REV. 791 (2007)

◊ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)

◊ *The American Law Institute's New Approach to Class Action Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)

◊ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)

◊ *Supreme Court Round-Up,* 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)

◊ *On The Difference Between Winning and Getting Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)

◊ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)

◊ *On Plaintiff Incentive Payments,* 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)

◊ *Percentage of What?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)

◊ *Lodestar v. Percentage: The Partial Success Wrinkle,* 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007)(with Alan Hirsch)

◊ *The Fairness Hearing: Adversarial and Regulatory Approaches,* 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))

◊ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action,* 74 U.M.K.C. L. REV. 709 (2006)

◊ *On What a "Private Attorney General" Is – And Why It Matters,* 57 VAND. L. REV. 2129(2004) (excerpted in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).

◊ *The Concept of Equality in Civil Procedure,* 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)

◊ *A Transactional Model of Adjudication,* 89 GEORGETOWN L.J. 371 (2000)

◊ *The Myth of Superiority,* 16 CONSTITUTIONAL COMMENTARY 599 (1999)

◊ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns,* 106 YALE L. J. 1623 (1997) (excerpted in COMPLEX LITIGATION 120-123 (1998))

Selected Presentations

◊ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 1, 2017

◊ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2016

◊ *Judicial Power and its Limits in Multidistrict Litigation,* American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016

◊ *Class Action Update & Attorneys' Fees Issues Checklist,* MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015

◊ *Class Action Law,* 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona, January 26, 2015

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013

◊ *Class Action Remedies,* ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013

◊ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda,* Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013

◊ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013

◊ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell,* UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013

◊ *Litigation's Mirror: The Procedural Consequences of Social Relationships,* Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012

◊ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012

◊ *Recent Developments in Class Action Law and Impact on MDL Cases,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010

◊ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010

◊ *Unpacking The "Rigorous Analysis" Standard,* ALI-ABA 12th Annual National Institute on Class Actions, New York, New York, November 7, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007

◊ *Current CAFA Consequences: Has Class Action Practice Changed?,* ALI-ABA 11th Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007

◊ *Using Law Professors as Expert Witnesses in Class Action Lawsuits,* ALI-ABA 10th Annual National
Institute on Class Actions, San Diego, California, October 6, 2006

◊ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006

◊ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006

◊ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006

◊ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005

◊ ALI-ABA 9th Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005

◊ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005

◊ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005

◊ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005

◊ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005

◊ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

SELECTED OTHER LITIGATION EXPERIENCE

United States Supreme Court

◊ Co-counsel on petition for writ of *certiorari* concerning application of the voluntary cessation doctrine to government defendants (*Rosebrock v. Hoffman*, 135 S. Ct.1893 (2015))

◊ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

◊ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (*Salazar v. Buono*, 130 S. Ct. 1803 (2010))

◊ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (*Lawrence v. Texas*, 539 U.S. 558 (2003))

◊ Co-authored *amicus* brief on scope of *Miranda* (*Illinois v. Perkins*, 496 U.S. 292 (1990))

Attorney's Fees

◊ Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom.*, *Berman DeValerio v. Olinsky*, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

◊ Served as *amicus curiae* and co-authored *amicus* brief on proper approach to attorney's fees in common fund cases, relied on by the court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016).

Consumer Class Action

◊ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (*Dydyk v. Apple Inc.,* 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)

◊ Co-class counsel in $8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (*In re Google Buzz Privacy Litigation,* 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

Disability

◊ Co-counsel in successful ADA challenge ($500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

Employment

◊ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); (*Phillips v. Wisc. Personnel Com'n*, 482 N.W.2d 121 (Wisc. 1992))

Equal Protection

◊ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))

◊ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc))

◊ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia's firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997))

Fair Housing

◊ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

Family Law

◊ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Srvcs.*, 656 So.2d 902 (Fla. 1995))

◊ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

First Amendment

◊ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding foruniversity student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))

◊ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

Landlord / Tenant

◊ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

Police

◊ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2nd Cir. 1994))

Racial Equality

◊ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 *(Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

SELECTED OTHER PUBLICATIONS

Editorials

◊ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005
◊ *Play It Straight*, NEW YORK TIMES, October 16, 2004
◊ *Hiding Behind the Constitution*, NEW YORK TIMES, March 20, 2004
◊ *Toward More Perfect Unions,* NEW YORK TIMES, November 20, 2003 (with Brad Sears)
◊ *Don't Ask, Don't Tell. Don't Believe It*, NEW YORK TIMES, July 20, 1993
◊ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

◊ Massachusetts (2008)
◊ California (2004)
◊ District of Columbia (1987) (inactive)
◊ Pennsylvania (1986) (inactive)

◊ U.S. Supreme Court (1993)

◊ U.S. Court of Appeals for the First Circuit (2010)
◊ U.S. Court of Appeals for the Second Circuit (2015)
◊ U.S. Court of Appeals for the Fifth Circuit (1989)
◊ U.S. Court of Appeals for the Ninth Circuit (2004)
◊ U.S. Court of Appeals for the Eleventh Circuit (1993)
◊ U.S. Court of Appeals for the D.C. Circuit (1993)

◊ U.S. District Courts for the Central District of California (2004)
◊ U.S. District Court for the District of the District of Columbia (1989)
◊ U.S. District Court for the District of Massachusetts (2010)
◊ U.S. District Court for the Northern District of California (2010)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: ALL ACTIONS	**Hon. Anita B. Brody**

ORDER

This case involves a variety of complex issues concerning attorney's fees. By Order dated August 23, 2017, the Court proposed to appoint an expert to assist it with consideration of these issues and specifically proposed appointing Professor William B. Rubenstein as that expert; that Order gave all parties an opportunity to show cause why the Court should not undertake these steps. Several parties have (1) asked for clarification of the expert's role; (2) argued against appointment of an expert or for delay in the appointment; (3) suggested alternative (or no) experts; and/or (4) raised questions about Professor Rubenstein's potential conflicts.[1] Having carefully considered those responses to the Order to Show Cause, the Court has decided to proceed with the appointment of Professor Rubenstein.

[1] Professor Rubenstein's c.v. reflects a prior involvement in this matter, as noted in several filings made in response to the Court's order to show cause. *See* ECF No. 8350; 8364; 8372. In connection with this proposed appointment, Professor Rubenstein explained to the Court that the Anapol Weiss law firm paid him to attend and speak at a meeting of plaintiffs' lawyers – including those who did and did not end up on the PSC – that was held on February 21, 2012, but

Among others, three sets of fee issues now before the Court include the following: (1) in some MDL cases of similar structure, other federal courts have capped the percentage that any lawyer may receive from his or her client's recovery;[2] (2) Class Counsel in this case seeks a "set-aside" of 5% from each of the plaintiffs' recoveries "for the purpose of reimbursing counsel for future common benefit work and expenses in conjunction with implementation of the Settlement" (ECF No. 7151 at 2); and (3) Class Counsel has filed a motion seeking an award of $112.5 million in attorney's fees and costs, which the NFL has agreed to pay in addition to the class's direct relief.

The Court has asked Professor Rubenstein to provide his expert opinion (1) on whether the Court has the authority to and should order a cap on the percentage that any class member in this case would be obligated to pay his attorney and if so, what that cap should be and how that cap should be implemented and (2) on the reasonableness of requiring class members to contribute a portion of their recoveries to a common benefit fund, whether 5% is an appropriate portion, and whether this process will result in any counsel being over-compensated (e.g., double-dipping); the Court itself will decide (3) the reasonableness of Class Counsel's request for $112.5 million and has not asked Professor Rubenstein to address this request directly in his report.

The Court has asked Professor Rubenstein to endeavor to submit a written report on these issues no later than December 1, 2017. All parties will have an opportunity to respond to

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that he has had no involvement in the matter since that date. As noted below, the parties will, in due course, have an opportunity to pursue any concerns that Professor Rubenstein's attendance at this meeting biased his opinions.

[2] In re Vioxx Products Liability Litigation, 574 F. Supp. 2d 606, 607 (E.D. La. 2008), on reconsideration in part, 650 F. Supp. 2d 549 (E.D. La. 2009) (capping contingent fee arrangements for all plaintiffs' attorneys at 32% plus reasonable costs).

Professor Rubenstein's report in writing and, pursuant to the provisions of FRE 706(b)(2), any party may depose Professor Rubenstein about his opinion after his report is submitted. In responding to Professor Rubenstein's report, parties may raise concerns about how alleged conflicts render Professor Rubenstein's opinions unreliable and the Court will consider those arguments in that context.

Accordingly, **AND NOW,** this ___14th__ day of September, 2017, pursuant to Federal Rule of Evidence 706, it is **ORDERED** that Professor William B. Rubenstein is appointed as an expert witness on attorneys' fees. Professor Rubenstein is entitled to reasonable compensation for his time, for the time of his research assistants, and for his costs, which, according to FRE 706(c), shall be paid by the parties as a cost in an amount to be determined by the Court.

s/Anita B. Brody

_____
ANITA B. BRODY, J.

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: ALL ACTIONS	**Hon. Anita B. Brody**

<u>RECEIPT OF EXPERT'S REPORT AND NOTICE</u>

By Order dated September 14, 2017 (ECF No. 8376), the Court appointed Professor William B. Rubenstein as an expert witness on attorneys' fees and asked Professor Rubenstein to submit a report on two sets of issues. Professor Rubenstein has submitted his expert report to the Court and the Court has posted it on ECF.

In appointing Professor Rubenstein, the Court noted that all interested parties would have an opportunity to respond to his report pursuant to the discretionary deposition process set forth in Fed. R. Evid. 706(b)(2). Professor Rubenstein's 47-page report is sufficiently comprehensive and detailed that I have decided that it will be most helpful to the Court and most efficient for the fee process to have interested parties simply respond in writing to Professor Rubenstein's opinions.

Accordingly, all interested parties may file briefs, limited to 10 pages in length, in response to Professor Rubenstein's expert report and the opinions offered therein **on or before**

Wednesday, January 3, 2018. Professor Rubenstein shall be entitled to file a reply to these comments on his Report **on or before Monday, January 22, 2018**.

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12/11/2017 s/Anita B. Brody

DATE ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to:

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	**Hon. Anita B. Brody**
THIS DOCUMENT RELATES TO: ALL ACTIONS	

ORDER

By Order dated September 14, 2017 (ECF No. 8376), the Court appointed Professor William B. Rubenstein as an expert witness on attorneys' fees and asked Professor Rubenstein to submit a report on two sets of issues. By Order dated December 11, 2017 (ECF No. 9527), the Court granted leave to file responsive pleadings. On January 19, 2017, Professor Rubenstein filed a reply (ECF No. 9571), which contained updates to his initial report.

Accordingly, interested parties may file a surreply to respond to any updates contained in Professor Rubenstein's reply, limited to 5 pages in length, **on or before Tuesday, January 30, 2018**.

s/Anita B. Brody

ANITA B. BRODY, J.
1/23/18

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: ALL ACTIONS	**Hon. Anita B. Brody**

ORDER

AND NOW, this __5TH__ day of December, 2017, it is **ORDERED** that the Alexander Objector's Motion to Compel Compliance with Case Management Order No. 5 (ECF No. 8396) is **DENIED**.

s/Anita B. Brody

ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to:

Copies **MAILED** on _____ to:

Latasha Porter

From: ecf_paed@paed.uscourts.gov
Sent: Thursday, April 19, 2018 8:53 AM
To: paedmail@paed.uscourts.gov
Subject: Activity in Case 2:12-md-02323-AB MDL-2323 IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION Order on Motion for Discovery

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United States District Court

Eastern District of Pennsylvania

Notice of Electronic Filing

The following transaction was entered on 4/19/2018 at 9:52 AM EDT and filed on 4/19/2018

Case Name:	MDL-2323 IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
Case Number:	2:12-md-02323-AB
Filer:	
Document Number:	9898(No document attached)

Docket Text:
ORDER finding as moot [7534]without prejudice to file when court considers co-lead counsel request for holdback. MOTION FOR DISCOVERY. SIGNED BY HONORABLE ANITA B. BRODY ON 4/19/2018.4/19/2018 ENTERED AND COPIES MAILED, E-MAILED AND FAXED.(BRODY, ANITA)

2:12-md-02323-AB Notice has been electronically mailed to:

CHRISTOPHER A. SEEGER cseeger@seegerweiss.com, MHughes@seegerweiss.com, dion--kekatos-1017@ecf.pacerpro.com, sabrina-tyjer-1389@ecf.pacerpro.com, swecf@seegerweiss.com

RICHARD L. SCHEFF rscheff@mmwr.com, cmarcovecchio@mmwr.com, dhayes@mmwr.com, richard-scheff-5761@ecf.pacerpro.com

THOMAS P. WAGNER tpwagner@mdwcg.com, mmkalin@mdwcg.com

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: ALL ACTIONS	**Hon. Anita B. Brody**

ORDER

AND NOW, this 14TH day of May, 2018, it is **ORDERED** that the Motion for Entry of Case Management Order Governing Applications for Attorneys' Fees; Cost Reimbursements; and Future Fee Set-Aside (ECF No. 7176) is **DENIED**.

s/Anita B. Brody

ANITA B. BRODY, J.

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IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: ALL ACTIONS	**Hon. Anita B. Brody**

ORDER

AND NOW, this 18th day of April, 2018, after careful consideration of the Motion of Class Counsel the Locks Firm for Appointment of Administrative Class Counsel (ECF No. 9786) it is **ORDERED** that the Motion is **DENIED**. All Motions for Joinder in the Locks Firm's Motion are **DENIED** as moot.[1]

In reaching this decision, the Court also considered:

- The response from the NFL Parties (ECF No. 9879),
- The response of Co-Lead Class Counsel Christopher Seeger (ECF No. 9885) with particular attention to the Declaration,
- The Status Report from the Claims Administrator (ECF No. 9882),
- The declaration of Matthew L. Garretson (ECF No. 9883),
- The statement of the Special Masters (ECF No. 9884),

[1] The Joinder Motions are ECF Nos. 9839, 9855, 9830, 9828, 9827, 9829, 9852, 9816, 9842, 9856, 9821, 9834, 9831, 9813, 9819, 9854, 9836, 9843, and 9820.

- The Court's role as the fiduciary to the Class Members,
- The Court's familiarity with all aspects of the implementation of the settlement and the chance to witness the fine job Seeger Weiss has done in protecting all the Members of the Class, and
- The Locks Firm's role in facilitating Third-Party Funding Agreements to Class Members prohibited under the Settlement Agreement. This undermines any claim by the Locks Firm that it would be able to faithfully administer the Agreement.

ANITA B. BRODY, J.

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IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: ALL ACTIONS	**Hon. Anita B. Brody**

ORDER

AND NOW, this _18th__ day of June, 2018, it is ORDERED that The Alexander Objectors Motion to Reconsider Withdrawing Fed. R. Evid. 706 Deposition and for Extension of Time to Respond to the Expert Report of Professor William B. Rubenstein (ECF No. 9536) is **DENIED** as moot.

s/Anita B. Brody

ANITA B. BRODY, J.

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IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: ALL ACTIONS	**Hon. Anita B. Brody**

ORDER

AND NOW, this _4th_ day of June, 2018, it is **ORDERED** that:

- The Alexander Objectors' Motion for Reconsideration/New Trial (ECF No. 9926) is **DENIED.**[1]
- The Alexander Objectors' Motion to Stay Enforcement of Attorneys' Fee Allocation Order (ECF No. 10022) is **DENIED.**

s/Anita B. Brody

ANITA B. BRODY, J.

[1] The Alexander Objectors bring their motion for "Reconsideration/New Trial" under Federal Rule of Civil Procedure 59(a)(1)(B) and Rule 59(e). Rule 59(a)(1)(B) only applies after a "nonjury trial," and is thus inapplicable. Rule 59(e) requires that the moving party must demonstrate one of the following: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice. *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). The Alexander Objectors fail to meet this burden.

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